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FEDERAL COMMUNICATIONS COMMISSION

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Citation Form: 4 FCC Rcd 1 (1989)

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Before the
Federal Communications Commission
Washington, D.C. 20554

.C Docket No. 78-72
Phase I

In the Matter of

MTS and WATS Market Structure

NECA Board of Directors

REPORT AND ORDER

Adopted: May 8, 1989; Released: May 22, 1989

By the Commission:

1. In this Order we modify our Part 69 access charge rules governing the composition of the National Exchange Carrier Association (NECA) Board of Directors. Our current rules provide for a NECA Board comprised of six directors jointly represented by subset I and II companies and nine members from subset III companies.[1] However, as described below, recent changes in the NECA common line pool have led to a possible divergence of interests of subset I and subset II companies.[2] Our revised rules, which continue the configuration now permitted through waiver,[3] will provide that the NECA Board of Directors will be composed of three members from subset I companies, three members from subset II companies, and nine members from subset III companies. This modification is necessary to reflect the interests of member companies in NECA's operations in the pooling structure that was implemented on April 1, 1989, since subset I and subset II groupings may have different interests in specific NECA functions.

2. On August 23, 1988, this Commission released a Notice of Proposed Rule Making[4] in response to a petition for Rule Making filed by NECA on January 29, 1988.[5] The NECA petition requested that this Commission revise Section 69.602(e) so that, as of January 1989, NECA's Board would have three members elected by subset I companies, three members elected by subset II companies, and nine members elected by subset III companies.[6]

3. Our rules currently provide that exchange carriers are divided into three subsets for purposes of representation on the Board of Directors of NECA. Subset I consists of "all the Bell System Operating Companies except Cincinnati Bell Inc. and Southern New England Telephone Company."[7] Subset II consists of "all other telephone companies with annual operating revenues in excess of forty million dollars."[8] Subset III consists of all exchange carriers other than those that are members of subsets I or II.[9] The present rules allocate membership on the Board according to a formula that, commencing in 1988, provided for six directors jointly representing subsets I and II, with nine directors representing subset III carriers.[10]

4. Since 1986, however, NECA has requested waivers of our rules to permit changes in the NECA Board structure to balance the interests of the NECA subset companies. Because of the varying interests of NECA's members in NECA's activities, the Common Carrier Bureau has granted waivers of Sections 69.602(d)-(e) of our rules to permit a NECA Board structure that was more representative of the member companies.[11] Pursuant to such an existing waiver, the present NECA Board consists of three subset I directors, three subset II directors, and nine subset III directors.[12]

5. The NECA petition asserts that a rule change prescribing a NECA Board structure of three subset I members, three subset II members and nine subset III members (consistent with the existing practice permitted through waiver) would properly balance the interests of NECA members in light of the voluntary common line pooling that became possible as a result of this Commission's May 1987 *NTS Recovery Order*.[13] NECA notes that the proposed rule modification would not change the total number of directors required by our rules for subsets I and II representation, but would ensure that representatives of both subset I and subset II companies would serve on the Board. NECA further states that, in light of the various functions NECA will perform beginning in 1989, a rule requiring three members each from subsets I and II will result in a more representative Board than if those two subsets were jointly represented as the current rule provides.

6. Six parties filed comments in response to our Notice.[14] No reply comments were filed. All of the parties support the proposed rule change. All parties agree that the rule changes are appropriate to ensure that members of both subset I and subset II companies will be effectively represented on the Board.[15] Most of the parties state that the NECA Board composition should reflect a more balanced representation of its members, especially in light of the varying interests created by the common line pooling changes that became effective April 1, 1989.[16] Bell Atlantic states that the subset I and subset II companies' interests will be different in the new pooling environment.[17] According to Bell Atlantic, all of the subset I companies have opted to leave the NECA common line pool, yet these companies will continue to have an interest in NECA matters because subset I companies will be obligated to pay long term and transitional support to companies electing to remain in the pool. In addition, sixteen of the twenty-three subset II companies will remain in the pool.[18] Bell Atlantic believes that under existing rules more numerous subset II companies could elect all six board directors for subsets I and II Board thereby denying fair representation to the subset I companies.[19] Bell Atlantic contends that the composition of the Board established by our current rules will not serve the "varying, and potentially competing, interests of" the subset I and subset II companies.[20]

7. With the modified pooling framework's alteration of NECA's functions, SWBT agrees that the composition of NECA's Board should be "consistent with NECA's current functions and operations."[21] USTA observes that NECA petitioned this Commission for the rule change and that NECA "should have the ability to determine the way in which it will make up the board that governs its affairs."[22] USTA and NTCA note that in past years, in order to achieve a balanced representation on NECA's Board, this Commission has granted waivers of the rules

governing the composition of the Board.[23] In fact, they note the relief granted in a Bureau waiver for 1989 is the same result proposed in our Notice.[24] Also, Bell Atlantic and NTCA agree that the proposed rule change would be in the public interest by ensuring effective representation of member companies on the Board.[25]

8. We agree that the subset I and II companies will have differing interests under the revised common line pooling structure. For example, interests will diverge as companies outside the pool (including all subset I carriers) must pay long term or transitional support to the carriers remaining in the pool (including many subset II carriers). This rule modification would eliminate the possibility of skewed representation if the more numerous subset II companies were to elect all six members of the NECA Board of Directors allocated to subsets I and II. The parties also uniformly agree that subset I and II companies should have equal and distinct representation on the Board. Accordingly, we conclude that Section 69.602 of our rules should be modified as set forth in Appendix A, effective 30 days after publication of this order in the Federal Register. Instead of having six directors jointly represent subset I and subset II, three directors will represent subset I and three directors will represent subset II. This modification will not change the total number of directors representing subsets I and II, but would ensure that representatives of both subset I and subset II companies would serve on the Board. This rule modification will tend to ensure that the NECA Board is responsive to the concerns of all member companies, and that NECA will have the guidance it needs to implement its various responsibilities in the new pooling environment.[26]

9. Accordingly, IT IS ORDERED, that the revisions to Part 69 of this Commission's rules shown in Appendix A below are ADOPTED,[27] effective 30 days after publication of this order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Sec. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. §§ 154, 201, 202, 203, 205, 218, 403.

2. Section 69.602 is amended by removing paragraphs (c) and (d), redesignating paragraphs (e)-(h) as paragraphs (c)-(f), and revising new paragraphs (c) and (f) to read as follows:

Section 69.602 Board of Directors

* * * * *

(c) In 1989 and thereafter, three directors shall represent the first subset, three directors shall represent the second subset, and nine directors shall represent the third subset.

* * * * *

(f) Directors shall serve for a term of one year commencing January 1 and concluding on December 31 of each year.

FOOTNOTES

[1] *See* 47 C.F.R. § 69.602.

[2] NECA now administers a modified pooling arrangement effective April 1, 1989, that requires it not only to administer the voluntary traffic sensitive and common line pools, but also to bill, collect and distribute long term and transitional support funds. As a result, NECA's functions will still directly affect those carriers that opt to leave the common line pool. *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, *Report and Order*, 2 FCC Rcd. 2953 (1987) (*NTS Recovery Order); recon.*, 3 FCC Rcd 4543 (1988) (*NTS Recovery Order Reconsideration), pet. for review pending*, Public Service Comm'n of D.C. v. FCC, D.C. Cir., Case No. 88-1661 (pet. filed Sept. 12, 1988).

[3] *See* infra note 6.

[4] MTS and WATS Market Structure, 3 FCC Rcd 5118 (1988).

[5] NECA's Petition was placed on public notice on Feb. 5, 1988.

[6] As an interim measure pending a decision on the Rule Making petition by this Commission, on June 7, 1988, NECA filed a Request for Waiver to allow it to elect a Board of Directors for 1989 that would be comprised of three members from subset I, three members from subset II, and nine members from subset III. The Common Carrier Bureau granted NECA's waiver request on July 20, 1988. (MTS and WATS Market Structure, NECA Board of Directors, CC Docket No. 78-72, Phase I, *Order Granting Waiver*, 3 FCC Rcd 4603 (1988).

[7] *See* 47 C.F.R. § 69.602(a)(1) (1987).

[8] *See* 47 C.F.R. § 69.602(a)(2).

[9] *See* 47 C.F.R. § 69.602(a)(3).

[10] The rules, which shifted over time, required that, in 1984 and 1985, the Board was to consist of five directors from subset I, three from subset II, and seven from subset III. In 1986 and 1987, the Board was to consist of four directors from subset I, three from subset II, and eight from subset III. In 1988 and thereafter, our rules presently require that the Board consist of six directors to represent subsets I and II jointly, and nine directors to represent subset III. 47 C.F.R. § 69.602(b)-(e).

[11] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, NECA Board of Directors, *Order Denying Requests for Waiver and Granting Waiver* (Mimeo No. 6949) (released Sept. 12, 1985); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, NECA Board of Directors, *Order Granting Waiver*, (Mimeo No. 5377) (released June 27, 1986); and MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, NECA Board of Directors, *Order Granting Waiver*, 2 FCC Rcd 4702 (1987).

[12] MTS and WATS Market Structure NECA Board of Directors, CC Docket No. 78-72, Phase I, *Order Granting Waiver*, 3 FCC Rcd 4603 (1988).

[13] *See NTS Recovery Order, supra.*

[14] The Bell Atlantic Telephone Companies (Bell Atlantic); BellSouth Telephone Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth); National Telephone Cooperative Association (NTCA); Pacific Bell and Nevada Bell (Pacific); Southwestern Bell Telephone Company (SWBT); and United States Telephone Association (USTA) filed comments in this proceeding.

[15] Bell Atlantic Comments at 2; BellSouth Comments at 2; NTCA Comments at 2; SWBT Comments at 2; Pacific Comments at 2; and USTA Comments at 2.

[16] Bell Atlantic Comments at 2; BellSouth Comments at 2; NTCA Comments at 2; and Pacific Comments at 2.

[17] Bell Atlantic Comments at 2.

[18] *Id.*

[19] *Id.* at 3.

[20] *Id.*

[21] SWBT Comments at 2.

[22] USTA Comments at 2.

[23] *Id.*; NTCA Comments at 3.

[24] *See supra* note 11.

[25] Bell Atlantic Comments at 3; NTCA Comments at 4.

[26] At the time Section 69.602 was adopted, we recognized that adjustments in the Board's structure might become desirable as conditions changed. *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Supplemental Order, 94 FCC 2d 852, 855 (1983).

[27] This action is taken pursuant to the authority contained in Sections 1, 4, 201-202, and 205 of the Communications Act of 1934 as amended. 47 U.S.C. §§ 151, 154, 201-202, 205, and Section 553 of the Administrative Procedures Act, 5 U.S.C. § 553.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

METACOMM CELLULAR PARTNERS — File No. 10113-CL-P-718-A-88

For a construction permit to establish a new cellular system to operate on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Wyoming 1 - Park, RSA (No. 718)

ORDER ON RECONSIDERATION

Adopted: May 12, 1989; Released: May 22, 1989

By the Chief, Common Carrier Bureau:

1. MetaComm Cellular Partners (MetaComm) has filed a Petition for Reconsideration seeking reinstatement of its application which was dismissed by the Mobile Services Division (MSD).

I. BACKGROUND

2. RSA applicants do not submit their original applications until after they have won a lottery. Initially they are required to file two microfiche copies. *See* Section 22.923 (b) of the Commission's rules. The microfiche copies filed by MetaComm did not depict the applicant's signature. Instead, the microfiche depicted a conformed signature in the signature block. MetaComm won the non-wireline lottery for the Wyoming 1 - Park, RSA (market 718), which was held an December 8, 1988. On December 16, 1988, MetaComm submitted the original hard copy of its application and two additional paper copies. By letter dated January 12, 1989, the MSD dismissed MetaComm's application as defective (*Public Notice*, Report No. CL-89-69, released January 24, 1989). In its letter of dismissal the MSD stated that MetaComm's application was defective because:

> [t]he microfiche copy is not a copy of the original application. The original application bears the applicant's signature on Form 401, while the microfiche copy contains a different, and unsigned, Form 401.

II. METACOMM'S CONTENTIONS

3. MetaComm contends that the Commission's rules did not require applicants to submit microfiche copies that included copies of the applicant's signature. MetaComm points out that Section 22.923(b) does not specify that the microfiche copies must depict the original signature. Moreover, MetaComm states, Section 1.743(c) provides that only an original application need be signed and copies may be conformed. MetaComm argues that in the absence of a specific requirement in Section 22.923(b), the provisions of Section 1.743(c) apply and its application was not defective.

4. MetaComm asserts that the MSD violated Section 553 of the Administrative Procedure Act because the dismissal constitutes a change in Commission policy that was enforced without notice, without affording the public an opportunity to comment, and without giving potential applicants an opportunity to apprise themselves of the filing requirements. MetaComm also maintains that even if it were determined that the Commission's rules require the microfiche to depict the signature, a curative amendment should have been entertained. MetaComm filed such an amendment on February 24, 1989.

III. DISCUSSION

5. MSA applicants in markets beyond the top 120 markets were required to file an original application and two microfiche copies. The MSA rule, Section 22.913(c), did not specify whether the microfiche copies had to include facsimiles of the applicants' signatures. However, the Common Carrier Bureau issued a Public Notice stating that only the original application had to be executed - the microfiche copies could be conformed to identify the signatory. *Public Notice*, Report No. CL-86-57, (Jan. 21, 1986), 51 Fed. Reg. 3420 (Jan. 27, 1986).

6. The Commission initially adopted a rule requiring RSA applicants to file three microfiche copies of the original application. *First Report and Order*, (Docket 85-388) 60 Rad. Reg. 2d 1029 (1986). In paragraph 22 of that Order the Commission specifically stated that the microfiche copies must include the original signature. Moreover, the newly amended Section 22.913(c) provided, in part, that:

> Applicants for Rural Service Areas must have an executed original application, but will initially be required to file three true black and white microfiche copies of the application containing an original signature, and a certification as defined in Section 22.913(b).

7. On May 18, 1988 the Commission released a *Further Order on Reconsideration* regarding the RSA rules. 64 Rad. Reg. 2d 1360 (1988) (*Further Order*). There is no discussion in the body of the *Further Order* relating to the filing of microfiche copies of RSA applications. However, a new Section 22.923 was adopted entitled "Content and Form of Rural Service Area applications." Sub-Section (b)(1) addresses the microfiche requirements as follows:

> (b) Applications for construction permits for initial cellular systems for Rural Service Areas shall be filed as set forth below:
>
> (1) Two microfiche copies of each application must be submitted and enclosed in microfiche jackets and be placed in a sealed 5 inch x 7 1/2 inch microfiche envelope. One microfiche jacket shall be labeled "Original" and the other jacket labeled "Copy". The microfiche must be reproduced only in negative form and in black and white (blue/black film which appears black to the naked eye is acceptable). The

> original microfiche must be of archival quality as defined in Section 22.2 of these Rules. Applicants are required to submit a Transmittal Sheet for Cellular Applications, copies of which may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Conspicuous by its absence is the requirement that the microfiche copies contain an original signature.[1]

8. Section 1.743 is a rule of general applicability entitled "Who may sign applications." This rule, at subsection (c), provides that only the original must be signed - copies may be conformed and does not address the form of microfiche copies.

9. Before an application can be dismissed for failure to meet stringent acceptability criteria explicit notice of the requirements must be given. The "less forgiving" the standard the "more precise" the notice must be. *Salzer v. FCC*, 778 F. 2d 869, 875 (D.C. Cir. 1985). We find that the RSA microfiche requirements were not sufficiently clear to sustain dismissal of an application for the deficiency found by the MSD. Despite an initial attempt to require RSA applicants to submit microfiche which include the applicant's signature, the final RSA rules as published are not very different than the MSA rules. MSA applicants were advised by the Bureau in a Public Notice that the microfiche copies could contain conformed signatures.

10. The text of the *First Report and Order* did make clear that, because an original paper copy of an application would be filed only after a lottery winner was announced, the microfiche copies filed initially should contain an original signature. The reason for such a rule is obvious. Since RSA applications were to be filed originally only on microfiche, a signature as required in 1.743 should have been contained on the application. Therefore, it was logical that the microfiche must contain an original signature.

11. Notwithstanding, in the *Further Order* the explicit language requiring that the microfiche contain an original signature was inadvertently deleted without explanation. It is evident that the Commission can, and now has, adopted rules which explicitly require that the microfiche depict the original signature. However, in the absence of a specific requirement to the contrary, applicants are not subject to having their applications dismissed if they rely on the general provisions of Section 1.743. MetaComm's application will, therefore, be reinstated.

12. We do require for our files, however, that we have two microfiche copies of a tentative selectee's application containing an original signature. These copies may be filed as a Section 1.65 amendment pursuant to Section 2.918 (b) of the rules. No such amendment should be filed unless an application has been placed on public notice as a tentative selectee.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by MetaComm Cellular Partners is granted and its application, File No. 10113-CL-P-718-A-88, is reinstated.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Even more recently the Commission adopted new rules governing the filing of Mobile Services Division applications. *Report and Order*, (CC Docket 88-161) 3 FCC Rcd. 6684 (1988), *pet. recon. pending*. The new procedures do not apply to the filing of initial round MSA or RSA applications, but rather apply to post-RSA filings. The *Report and Order* provides that each microfiche copy of an application "should be a copy of the signed original". The new rules have not yet become effective.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC TELECOM CABLE, INC. File No. ISP-89-002

Request for Clarification of Policies Concerning Use of Independent International Cables.

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1989; Released: May 22, 1989

By the Commission:

1. On January 5, 1989, Pacific Telecom Cable, Inc. (PTC) filed a request with the Commission asking that we clarify certain aspects of our policy pertaining to common carrier use of private cable systems. PTC is conditionally licensed to land and operate in the United States a privately owned high capacity digital submarine cable (the North Pacific Cable (NPC)) between the U.S. and Japan.[1] In its filing, PTC requests that the Commission make the following clarifications: 1) there are no service restrictions on the use of NPC and that NPC may be made available by PTC on a bulk capacity basis to common carriers for switched services; and 2) the showing required under Section 214 of the Communications Act of 1934, as amended, for carrier use of NPC is the same as, and no more burdensome than, the Section 214 showing required for carrier use of carrier-owned cable facilities.

2. We placed PTC's request on public notice January 11, 1989. American Telephone and Telegraph Company (AT&T), the Department of Defense (DOD), MCI International, Inc. (MCII), OTI Corporation (OTI) and Private Transatlantic Telecommunications System, Inc. (PSI) filed comments in response. AT&T and PTC submitted reply comments. For the reasons set forth below, we grant PTC's request for clarification.

3. In its request for clarification, PTC states that certain aspects of the Commission's independent cable policy are ambiguous. PTC indicates that these ambiguities are discouraging foreign entities from supporting and using NPC. According to PTC, the international community believes that the Commission: 1) imposes service restrictions on the use of independent cables; and 2) requires common carriers wishing to utilize capacity on independent cables to demonstrate that their use of the cable will not cause economic harm to planned or existing common carrier facilities.

4. First, with regard to service restrictions, PTC claims that there is confusion in the international marketplace concerning the regulatory framework applicable to NPC. Foreign as well as U.S. carriers, it argues, are reluctant to enter into correspondent agreements specifying use of an independent facility because they are unsure whether use of the facility is restricted. It attributes this confusion, in part, to the differing regulatory approaches taken by the U.S. and Japan: the U.S. end of the cable will operate as a non-tariffed, private facility and the Japanese end will operate on a common carrier basis. Therefore, in order to clarify the framework, PTC requests that the Commission state that there are no restrictions, beyond the normal Section 214 authorization process, on the use of NPC by either private line users or common carriers for switched services.

5. Second, PTC claims there is a misperception in the international marketplace that the Commission requires carriers to demonstrate in their applications for Section 214 authorization that use of NPC will not cause economic harm to planned or existing common carrier facilities. PTC argues that there is no legal basis for an economic harm showing under Section 214. It believes all that should be required for authorization to utilize capacity on NPC is a demonstration of need for the capacity and the cost effectiveness of the capacity desired. PTC maintains that any implication that potential carrier users of NPC must bear an extraordinary burden under Section 214 to show that use of NPC would not divert traffic from carrier-owned facilities inhibits carrier purchase of bulk capacity on NPC. According to it, the concept of protecting AT&T and the other U.S. international service carriers from economic harm due to availability of other facility options is antithetical to the Commission's object of achieving greater benefits for ratepayers through facilities based competition. PTC believes that the possible shift of some existing or new traffic from a carrier-owned facility to an independent facility such as NPC, is a necessary and desirable consequence of competition. Furthermore, it argues that use of NPC by any U.S. carrier other than AT&T, by definition, will not involve diversion of major amounts of traffic. Therefore, PTC asks the Commission to state that carriers seeking to utilize capacity on NPC are not required to make any showing above and beyond the normal Section 214 requirements.

COMMENTS

6. AT&T, DOD and MCII oppose PTC's request. AT&T and MCII argue in their pleadings that no misunderstanding on the part of potential foreign and domestic carriers is plausible in view of the unambiguous terms of the license issued to PTC and the absence of any restrictions on the services that carriers may provide on NPC. Since the Bureau expressly contemplated, and did not preclude, common carriers from using PTC's facilities to provide any of their authorized services, they believe there is no need for the Commission to clarify its policy. AT&T and MCII assert that it is improper for PTC to ask the Commission to state that there are no service restrictions on carrier use of NPC. Such a statement, they claim, assumes that the Commission would never be presented with reasons to impose service restrictions upon common carriers seeking to use NPC and that any common carrier seeking to use capacity in NPC would automatically receive authorization from the Commission. AT&T and MCII maintain that the Commission has expansive authority pursuant to Section 214 to consider all relevant public interest concerns in authorizing carriers to operate and acquire facilities, including the economic impact any carrier use of NPC might have on planned and constructed common carrier facilities and on the services provided to the public.

7. In addition, MCII proposes that the Commission impose certain conditions on the use of NPC for carrier provided switched services. It states that any "authority should be granted with the imposition of conditions that at a minimum provide for the application of those carrier-type regulations now in effect for carrier cables regarding the activation of circuits, the transfer of costs of these circuits, and nondiscriminatory access to cable head facilities associated with NPC."[2]

8. As one of the larger users of existing northern Pacific Ocean facilities, DOD expresses concern that Commission approval of PTC's request could have the effect of encouraging carriers to divert traffic from existing or planned carrier-owned facilities to NPC. It believes significant diversion of traffic from carrier facilities could have an adverse impact on the price it pays for certain services. DOD argues that if carriers are allowed to divert traffic from existing or planned facilities to NPC without regulatory restraint, the remaining users would be forced to pay a disproportionate share of the costs of those facilities. It also urges the Commission to avoid making any blanket rulings that could constrain its ability to make public interest determinations on individual carrier applications for use of NPC. Finally, DOD argues that employment of an economic harm test as part of the application review process is a proper and reasonable exercise of the Commission's authority under the Communications Act.

9. OTI and PSI support PTC's request. They believe the requested rulings are necessary to promote competition in the international communications industry. OTI and PSI are concerned that the imposition of additional requirements would artificially inflate the cost of acquiring capacity and would unnecessarily erect barriers to market entry. In their view, existing Section 214 requirements provide ample information to evaluate common carrier applications to acquire private cable capacity. OTI also asks the Commission to state that once a carrier is authorized to acquire capacity on a private cable for the provision of service to specific geographic markets, the carrier may acquire additional capacity subject only to the reporting requirements found in Section 63.10 of the Commission's Rules.

10. In its reply comments, PTC states that no substantive factual or legal objections have been raised against its request. PTC asserts that any contention that diversion of substantial traffic from carrier facilities could cause economic harm to carriers and adversely affect existing customers and ratepayers is based on mere theory. In PTC's opinion, NPC will most likely be used by smaller, nondominant carriers just entering the market to carry new traffic or to supplement their needs in cases where they may have underestimated traffic on given routes. PTC states that it does not expect the Commission to encourage carriers to divert traffic to independent facilities, but believes that it is appropriate for the Commission to dispel misperceptions that discourage such use. It notes that the parties opposed to the Commission making such clarifying statements are entrenched carriers seeking to protect their own facility investments. PTC denies suggestions that it is attempting to obtain reconsideration of its landing license and claims that it is simply asking the Commission to help remove any basis for the misperceptions currently held in international markets concerning common carrier use of independent cables. Additionally, PTC believes OTI's proposal concerning acquisition of additional capacity should be adopted. It argues that once a carrier's use of an independent cable has been authorized, there is no justifiable reason to impose restrictive conditions under which that carrier may accommodate growth traffic. It also disagrees with MCII that the Commission should place common carrier-type regulatory restrictions on NPC.

DISCUSSION

11. The Commission adopted its private submarine cable policy in 1985 to promote competition in the provision of international transmission facilities. We granted PSI, formerly Tel-Optik, Ltd., a cable landing license to land and operate a private optical fiber transatlantic cable system (PTAT) between the United States and the United Kingdom.[3] We authorized PSI to sell or lease capacity in its PTAT system on a non-common carrier basis. However, we did not preclude the possibility that common carriers would be permitted to acquire capacity in the system for the provision of their services. We stated that we would require carriers interested in acquiring capacity in PTAT to seek authority under Section 214. We stated further that we would utilize the Section 214 application process to evaluate the potential effect of traffic diversion from existing or planned satellite or cable common carrier facilities to the private system.[4]

12. The Common Carrier Bureau granted a cable landing license to PTC to land and operate a fiber optic submarine cable between the United States and Japan pursuant to the policy established in authorizing the PTAT system. The Bureau authorized PTC to sell or lease capacity on the NPC system on a non-common carrier basis. Consistent with Commission policy, the Bureau did not preclude common carrier use of NPC. However, the Bureau emphasized that it is the Commission's policy that private cable systems shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of any system. The Bureau stated that common carrier use of NPC would be subject to the Section 214 application process.

13. In stating that common carriers may use private cable facilities, we intended neither to: 1) impose restrictions on the provision of switched services; nor 2) place special burdens on any carrier making an application for private cable capacity. First, it has never been our intention to restrict the kinds of services that may be offered via private cables. At present, there is no Commission rule or policy which would prohibit PTC from making capacity available to common carriers for the provision of switched services.[5] Restrictions on the provision of switched services apply solely to international communication satellite systems separate from the INTELSAT global system. There the Commission has limited separate systems to the provision of service through the sale or long-term lease of space segment capacity for communications not interconnected with the public-switched message network.[6] We have neither applied this restriction on private cables nor imposed any limit on the amount of capacity a carrier may seek to acquire on private cables.[7]

14. Second, we have not placed any special burden on common carriers seeking Section 214 authorization to acquire and utilize capacity on private cables. Carriers are not required to demonstrate in their applications that acquisition of capacity on a private cable will not cause economic harm to planned or existing common carrier operations.[8] Rather, they must only provide the informa-

tion required by the Commission's rules to to be contained in a Section 214 application. Of course, the Commission has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues that may be raised by an application and to consider such issues when raised by a third party filing comments in response to the application.[9] However, we do not anticipate that common carrier acquisition of private cable capacity would normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the presence of these factors would not be conclusive evidence of economic harm. Resolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us.

15. Finally, in its comments, OTI stated that the Commission should eliminate the Section 214 filing for applicants wishing to acquire additional private cable capacity. This is not the proper proceeding for consideration of this proposal. In *International Competitive Carrier*, we decided not to apply streamlined Section 214 procedures to non-dominant international carrier acquisition of private cable or satellite facilities. We stated that we would require non-dominant international carriers to file Section 214 applications to acquire capacity from any private cables or satellites.[10] We explained that such authorizations on these projects are necessary for our long-range facilities planning responsibility as well as to assure compliance with any conditions placed on private systems. Furthermore, we stated that requiring non-dominant international carriers to file applications for the use of private facilities " . . . is consistent with our recent policy statements concerning private submarine cables and separate satellite systems." Any change in this policy would require a rule making proceeding.

16. Accordingly, IT IS ORDERED that the request for clarification filed by PTC, File No. ISP-89-002, IS GRANTED consistent with the discussion above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (1987). Although the Common Carrier Bureau approved the cable, it withheld the final cable landing license pending a demonstration by PTC that U.S. entities will be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable.

[2] Comments of MCI International, Inc., File No. ISP-89-002, pg. 10.

[3] Cable Landing License, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003 (released May 17, 1985). *See also* Tel-Optik Limited, 100 FCC 2d 1033 (1985) (Private Submarine Cable decision).

[4] *Id.* at 1048.

[5] For example, in Allnet Communications Services, Inc., 2 FCC Rcd 6633 (1987), the Common Carrier Bureau granted Allnet Section 214 authority to acquire capacity on the PTAT system for the provision of its authorized common carrier services, including switched voice service.

[6] *See* Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985).

[7] In its comments, MCII requests that the Commission impose "carrier-type" regulations on private cable systems. PTC argues in its reply comments that it would be completely inappropriate to apply carrier-type regulations to the operation of NPC. It states that such a proposal is counter to the whole thrust of the Commission's deregulatory international policies. We agree with PTC that MCII's request is outside the scope of this proceeding. We need not decide here what conditions, if any, we should place on common carrier use of private cables. We believe a decision of this nature should be made in the application process.

[8] The Bureau did not require Allnet to make any special showing as to the potential effect of its proposed acquisition of PTAT capacity on existing or planned common carrier facilities. Allnet included in its Section 214 application the information normally required under the Commission's rules. The Bureau found that Allnet's acquisition of PTAT facilities would neither impair services to the public nor cause significant economic harm to carriers owning or using existing transmission facilities. *See* Allnet Communications Services, Inc., *supra* note 4.

[9] In issuing PTC a conditional cable landing license, the Bureau stated that:

> Should carriers request circuits on NPC, we would have an opportunity to consider the potential effect of traffic diversion from existing or planned common carrier facilities in our normal facilities planning and authorization processes.

Pacific Telecom Cable, 2 FCC Rcd at 2688.

[10] International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-476

In the Matter of

New York Metropolitan Area
Region 8 Public Safety Plan

ORDER

Adopted: May 12, 1989; Released: May 22, 1989

By the Chief, Private Radio Bureau and the Chief Engineer:

I. INTRODUCTION

1. By this action, the Commission accepts the regional public safety plan for the New York Metropolitan Area, Region 8, subject to the conditions stipulated herein. The requirements for regional public safety plans were contained in our *Report and Order* in Gen. Docket No. 87-112.[1] The Region 8 Plan is the first regional plan submitted to the Commission and is the culmination of the efforts of the many public safety organizations that participated in its development.

II. BACKGROUND

2. On December 8, 1983, the Congress directed[2] the Commission to develop a plan to ensure that the present and future electromagnetic spectrum requirements of state and local public safety authorities be considered in the agency's spectrum allocations decisions. The Commission, in response to this Congressional directive, subsequently allocated six megahertz of spectrum in the 821-824/866-869 MHz bands for use, nationwide, by public safety authorities. In making this allocation decision, however, the Commission provided that the spectrum would not be made available for licensing until a National Plan was developed to ensure the efficient use of the new allocation.

3. To assist in the development of this National Public Safety Plan, in December of 1986 the Commission established the National Public Safety Planning Advisory Committee (NPSPAC) to involve parties interested in public safety in the planning effort. Then, in May of 1987, following issuance of NPSPAC's *Initial Report*,[3] the Commission released a *Notice of Proposed Rule Making*[4] *(Notice)* proposing rules and policies looking toward the establishment of a National Plan for Public Safety (National Plan). Recognizing that the spectrum needs of public safety agencies differ to some extent throughout the country, the Commission proposed the establishment of regional planning committees to develop plans designed to meet the individual and joint communications needs of public safety agencies within that region. Following the receipt of extensive comments on our proposal as well as NPSPAC's *Final Report*, received on September 9, 1987, the Commission released its *Report and Order*, *supra*, setting forth its National Plan for Public Safety on December 18, 1987.

4. Insofar as the current proceeding is concerned, the Commission's *Report and Order* endorsed the regional planning concept proposed in the *Notice* and recommended by NPSPAC as the best method for assuring that the new spectrum allocation is used nationwide as efficiently as possible. To this end, the Commission established fifty-five (55)[5] regions that encompassed all the land area of the United States, including Puerto Rico and the U.S. Virgin Islands. The Commission instructed each region to develop a plan for use of the newly allocated spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the area. Additionally, the Commission's *Report and Order* establishes various procedural and substantive requirements for each regional plan but, at the same time, invests considerable discretion in each area to decide how the public safety spectrum should be used to meet the present and future needs of state and local public safety authorities. The Commission's goal, in this regard, is to provide the various regions with the autonomy necessary to be able to design and construct systems that would meet the unique communications needs of their public safety agencies.

5. After each plan is completed and approved by its regional planning committee, it must be submitted to the Chief, Private Radio Bureau and the Chief Engineer. The plan is then placed on public notice and comments are solicited for a 45-day period. The two Bureaus jointly review each plan in conjunction with any comments submitted. The staff performs an independent analysis of each plan and reviews the comments to identify specific problem areas that may only be apparent to those involved in public safety communications in a particular region. After the review process, if the Bureaus determine that a plan is deficient in any of the required elements, the plan is returned to the regional planning committee for further work. Once the two Bureau Chiefs have formally accepted a plan, the individual public safety entities can begin applying for licensing in the new 800 MHz spectrum.

III. THE NEW YORK METROPOLITAN AREA PLAN

6. On September 22, 1988, the New York Metropolitan Area, Region 8,[6] submitted its plan to the Commission for review and approval. Region 8 comprises counties from Connecticut, New York and New Jersey.[7] The Region 8 Plan provides a frequency assignment allocation plan for the first round of applicants who filed within New York's first window, and a basis for evaluating and accommodating future applicants. Specifically, the plan provides a summary of its major elements, including usage guidelines, frequency reassignment, common channel implementation, encryption, use of long-range and cellular communications, application evaluation and appeal procedures. In a general description of how the spectrum is to be allotted among the various eligible users within the region, the plan "walks" through the algorithm it has adopted to maximize spectrum efficiency. The plan explains how the requirements of all eligible entities within

the region were considered and met to the degree possible, and how future needs will be handled.[8] It explains how the Plan has been coordinated with adjacent regions and offers a detailed description of how the plan puts the spectrum to the best possible use by requiring system design with minimum coverage areas, by assigning frequencies so that maximum frequency reuse and offset channel use may be made, by using trunking, and by requiring small entities with minimal requirements to join together on a single system where possible.[9]

IV. COMMENTS

7. The Region 8 Plan was placed on Public Notice by the Commission for comments on September 29, 1988. The Commission received four comments from the following parties: the American Association of State Highway and Transportation Officials, Special Committee on Communications (AASHTO), Region 28 Planning Committee (Region 28), Associated Public-Safety Communications Officers, Inc. (APCO) and General Electric Mobile Communications (GE). Regions 8 and 28 filed joint reply comments (Joint Reply Comments).

8. APCO hails Region 8's Plan as an excellent product, a worthy first and recommends that the Commission adopt it as expeditiously as possible. APCO Comments at 1-2. AASHTO, however, expresses some concern about the reassignment of "turned back" channels. AASHTO states that the National Plan places responsibility for coordinating reassignment of these channels in the hands of the Regional Planning Committee rather than the designated frequency coordinators. AASHTO would prefer that all turned back channels be returned to their respective coordination bodies. AASHTO Comments at 2. AASHTO also expresses concern over the use of the matrix evaluation method of frequency reassignment. AASHTO fears that this procedure takes on the appearance of assigning higher priorities or needs to one service over another. AASHTO believes that all public safety radio services should be considered equal.

9. Neighboring Region 28 also asserts that Region 8 failed to coordinate with them despite their common boundaries, and that it assigned channels to relatively rural areas, arbitrarily precluding Region 28 from using those frequencies. Region 28 Comments at 2. Region 28 is specifically concerned that overlap would exist between the two regions if Region 8 assigns statewide operations in New Jersey. Region 28 Comments at 2-3. Additionally, GE recommends in its comments that the Commission condition its acceptance of Region 8's Plan upon the use of encrypted signals that will fit within the 25 kHz channels authorized in the National Plan, and not require two or more channels. GE Comments at 1 and 4.

V. DISCUSSION

10. The Commission has reviewed the plan submitted for Region 8 and finds that it conforms with the National Public Safety Plan and includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112. Generally, the commenters lauded it as an exemplary first effort on the part of a region faced with a huge population concentration spread over three states and encompassing a multitude of public safety and special emergency entities. The composition of Region 8 and the need to accommodate a tremendous quantity and diversity of public safety and special emergency mobile communication requirements within a limited amount of spectrum required an extensive and technically sophisticated planning process. Region 8's efforts to achieve maximum frequency reuse by limiting coverage to each system's needs and allotting frequencies by sub-regions, much as is done in cellular systems, are commendable. The limitations placed on small systems that are allowed to use the conventional mode embody the spirit of the National Plan. Region 8's use of a computer assignment scheme resulted in frequency specific assignments that meet all the requirements identified in the region's first filing window with some spectrum left over. The parameters used in the evaluation matrix should assure fairness and efficiency in future assignments.

11. With regard to AASHTO's concerns, in our *Memorandum Opinion and Order on Reconsideration (Reconsideration Order)*,[10] we addressed the issue of regional planning committee authority over give-back or turned back frequencies because the International Municipal Signal Association and the International Association of Fire Chiefs (IMSA/IAFC) had raised it in their petition for reconsideration and clarification. In the *Reconsideration Order*, we observed that the regional planning concept was developed to provide a framework for the assignment of the newly allocated public safety spectrum. We also noted that, to the extent possible, regional planning committees should attempt to satisfy their public safety needs utilizing this spectrum. We also provided that regional plans may encompass consideration of other public safety and special emergency bands when the new frequencies are insufficient to meet the needs of the region. The regional plan's role in reassigning turned back frequencies is limited to those situations where the new 800 MHz frequencies are insufficient. Since that was not the case here, and all needs have been met, we need not further address AASHTO's concerns regarding turned-back frequencies at this time.

12. In its initial filing window, the region succeeded in satisfying the needs of all applicants requesting channels in the new 800 MHz bands. In its plan, the region has proposed the use of an evaluation matrix to prioritize entities that may apply for channels in the future. AASHTO is concerned that use of such a prioritization scheme could result in unequal treatment of these public safety radio service applicants. AASHTO believes that all public safety radio services should be considered equal. AASHTO's position is inconsistent with the Commission's stated policy in the *Report and Order* in Gen. Docket No. 87-112 which reads in part, "We believe that regional planning committees are in the best position to determine which services are of the greatest importance to public safety in their regions."[11] In those instances where not all needs are met, Regional Planning Committees have the obligation to determine priorities within the regions. To that end, Region 8's matrix is designed to assign channels to the highest priority use in the Region. The point values assigned to the various services are but one of seven factors. The matrix includes such variables as need, intersystem communications, degree of inter-operability, loading, spectrum efficiency of technology, geographic efficiency and give-backs. Furthermore, the Region 8 Plan provides an appeal procedure for those who feel that the evaluation matrix resulted in an unfair assignment.

13. Concerning Region 28's comments, it is, of course, incumbent upon adjoining regions to coordinate their planning activities with each other. As stated in our *Report and Order*[12], each plan must include "an explanation of how the plan has been coordinated with adjacent regions" (¶ 51). Although initially deficient in this area, Regions 8 and 28 in their Joint Reply Comments stated that the Committees agreed that two footnotes should be added to the table of Channel Assignments that would clarify the intention of Region 8 and resolve the concerns of Region 28.[13] The Commission also notes that the two remaining adjacent regions, Region 19 (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut (except Fairfield, Litchfield, New Haven and Middlesex counties)) and Region 30 (New York - Albany, (except the area in the New York Metropolitan Region 8, and the New York - Buffalo Region 55)), which are not as far along in their planning processes, may require future coordination with the New York Region. The New York Plan is accepted subject to appropriate future coordination with the adjacent regions. It is, of course, the continuing obligation of all regions to coordinate their planning activities to fulfill the goals and objectives of the National Public Safety Plan. In this regard, we will require that all regional public safety plans not currently filed with the Commission include a statement that the plan has been coordinated with adjacent regions. They must give the dates of notification and the response from each of those regions. Regional Planning Committees may wish to include copies of letters to meet this requirement.

14. We agree with GE's comments that encryption equipment requiring more than one channel is frequency inefficient. Use of equipment requiring more than 25 kHz bandwidth for encryption purposes is discouraged.[14]

VI. CONCLUSION

15. Like the parties who filed comments in this proceeding, the Commission recognizes the tremendous effort that went into preparing the Region 8 Plan and commends the Tri-State Radio Planning Committee for its excellent work. The New York metropolitan area presented a challenge in terms of size, complexity and originality. We were pleased to see the frequency reuse plan, the way in which blocks of frequencies were organized for wide area systems and the careful detail evident throughout, down to specific channel assignments. We believe the Region 8 Plan represents a careful balance of the public safety and special emergency mobile communication needs throughout the area and will result in efficient use of the newly allocated 800 MHz Public Safety radio spectrum. This Plan is indeed a landmark for the Public Safety community. It marks the first step over the threshold to actual licensing of the frequencies.

16. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 8 IS ACCEPTED with the addition of the two footnotes to the table of channel assignments referenced in the Joint Reply Comments of Regions 8 and 28, and conditioned on Region 8's ongoing good faith coordination with adjacent Regions 19 and 30. Accordingly, licensing of the various channels may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[2] *See* Federal Communications Commission Authorization Act of 1983, December 8, 1983, P.L. 98-214, 97 Stat. 1467, Section 9(a).

[3] NPSPAC, Initial Report To the Federal Communications Commission, *published in* Appendix B, Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869, 2873-92 (1987) (*Initial Report*).

[4] Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 Rcd 2869 (1987).

[5] The Report and Order established 48 Regions. This number and the boundaries were amended by the Memorandum Opinion and Order, 3 FCC Rcd 2113 (1988).

[6] Region 8 has a stated population of over 20 million people. Plan at 7. The planning committee established an initial filing window for applicants. The Plan's proposed assignments leave over 60 channels unassigned and available for future use. We understand that additional filing windows will be opened in the future for public safety entities who missed the initial filing window or who need to expand their systems.

[7] These counties are: Fairfield, Litchfield, New Haven, and Middlesex Counties, Connecticut; Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, Dutchess, and Westchester Counties, New York; Bergen, Essex, Hudson, Morris, Passaic, Sussex, Union, Warren, Middlesex, Somerset, Hunterdon, Mercer, and Monmouth Counties, New Jersey.

[8] According to the Plan, after a needs assessment has been conducted, each application is put through the algorithm and scored based upon seven factors: type of service, intersystem communications, loading, spectrum efficient technology, system implementation factors, geographic efficiency and channel givebacks. Plan at 27-30.

[9] The algorithm referred to previously is weighted to reward applicants for spectrum efficient systems. "Systems of four or less channels operating in the conventional mode who do not meet FCC loading standards will be required to share the frequency on a non-exclusive basis." Plan at 10.

[10] Memorandum Opinion and Order on Reconsideration, Gen. Docket No. 87-112, 3 FCC Rcd 5391 (1988) at paras. 46-48.

[11] Report and Order at para. 13.

[12] Report and Order at para. 51.

[13] The two footnotes are: Note 1 - Pool assignments to peripheral counties are for illustrative purposes to show potential for channel reuse within the region. Protection criteria will not apply to pool assignments until they are specifically assigned to this or an adjoining region; and Note 2 - Assignments identified in this table apply only to the defined area of this region. Applicants proposing to expand operations beyond the bounds of

this Region must obtain approval from other Regional Committees affected. The joint Reply suggests that Region 8 will submit the Plan for amendment to specifically incorporate these footnotes; however, to avoid any unnecessary delay, we are considering the amendment at this time.

[14] *See* Report and Order at para. 22.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

May 9, 1989 **Released: May 22, 1989**

Lauren A. Colby, Esquire
10 E. Fourth Street
P. O. Box 113
Frederick, MD 21701

Re: BIRACH BROADCASTING CORPORATION
Licensee of Station WNZK-AM
Westland, Michigan
File No. ARN-871027

Dear Mr. Colby:

This is with reference to the Application for Review filed on November 16, 1987, by Birach Broadcasting Corporation (Birach), licensee of Station WNZK-AM, Westland, Michigan. Birach requests that the Commission reverse a staff ruling dismissing its application for a power increase, unlimited time operation and a change in city of license to Dearborn Heights, Michigan.

On October 27, 1987, Birach filed an application for a construction permit for a change in the facilities of Station WNZK-AM from daytime-only to unlimited time. That application also requests an increase in the daytime power from 1.0 kilowatt to 5.0 kilowatts. Although the application reflects continued daytime operation on the authorized frequency of 690 kHz, it specifies a nighttime operation with a power of 2.5 kilowatts on the adjacent channel 680 kHz. In support of its application, Birach maintains that the nighttime frequency proposed cannot be used to establish another daytime or fulltime station in the vicinity of Westland, Michigan, because any such new station would interfere with reception of Station WNZK-AM.

By letter of November 6, 1987, the Chief, AM Branch, dismissed the above modification application as being patently defective. The letter indicated that awarding a split frequency to a licensee for a single broadcast operation was not contemplated by Commission rules and beyond the scope of a waiver request. In its Application for Review, Birach now argues that Station WNZK-AM's situation is unique; that it is a successful AM station providing a special foreign language program service to the ethnic minorities in the Detroit, Michigan, area; and that its proposal will not waste spectrum. Specifically, Birach states that it has conducted an engineering study which demonstrates that Station WNZK-AM cannot operate on its present frequency of 690 kHz at night because of severe protection problems toward Station CBF in Montreal, Canada. Nor can Birach move Station WNZK-AM to the adjacent frequency of 680 kHz, because on that frequency there would be intolerable daytime interference with Canadian Station CFTR, Toronto, Canada. Birach explains, however, that at night CFTR employs a directional pattern which would permit a nighttime operation on the frequency 680 kHz in the Detroit area without any objectionable interference to or from CFTR. Further, in a supplement filed on May 26, 1988, Birach states that a study of all U.S. daytime-only stations within 200 miles of the Canadian border that operate on the eight Class I channels allocated to Canada demonstrates that there are few, if any, situations similar to that of WNZK in the United States.[1]

After reviewing the record, we affirm the staff finding that Commission rules do not contemplate an AM broadcast station operating on split frequencies. For reasons set forth below, however, we reverse the staff decision that Birach's proposal was beyond the scope of a waiver request and its consequent decision to dismiss Birach's application as patently defective.

Birach has repeatedly asserted that Commission rules do not prohibit the split-frequency operation it proposes. In *Helm Coal Co.*, 6 RR 547 (1950), however, the Commission reached a contrary conclusion. In that case, the licensee of daytime AM station WNOW in York, Pennsylvania, and the licensee of daytime AM station KSPI in Stillwater, Oklahoma, sought authorization to operate at night on frequencies adjacent to their authorized daytime frequencies. Like Birach, they claimed such operation was not inconsistent with Commission rules, and, in particular, with the definition of standard broadcast station appearing in those rules. The Commission, however, found an intent in the wording of the definition to restrict a standard broadcast station's operation to a single channel. Thus, applying the same rationale to this case, Birach's proposal would violate Section 73.14 of the Commission rules, 47 C.F.R. Section 73.14, and its application would therefore be patently defective.

This does not, however, end our inquiry. Birach has also requested that its application be viewed as a waiver request if such would be required to make the application acceptable for filing. In considering a waiver request, we must determine whether the public interest served generally by our strictly applying the single channel restriction would in this case be better served by our waiving that restriction. In making this determination, we weigh two factors: (1) the extent to which a waiver in this case would undermine the policies the single frequency restriction was designed to further and (2) the extent to which a waiver in this case would promote any significant Commission policies. *See WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969).

Our AM service allocation policy was designed to achieve three objectives: (1) to provide service of satisfactory signal strength to all parts of the country; (2) to provide as many program choices to as many listeners as possible; and (3) to provide service of local origin to as many communities as possible. *See Clear Channel Broadcasting in the Standard Broadcast Band*, 31 FCC 565, 567 (1961). *In Helm Coal Co., supra*, the Commission concluded that its allocation scheme required that licensees be restricted to single channel operation.

In considering the objectives that the Commission intended its allocation plan to achieve and how far the Commission still found itself in 1950 from fully meeting those objectives, it is hardly surprising that the Commission would have reached that conclusion. In 1950, AM broadcast service was still experiencing expansive growth. But many parts of the country were still "white" or lacked local service. Despite the Commission's growing

concern about the adverse effects on service quality from adjacent channel and co-channel interference, its allocation rules were designed to permit as many authorizations as technically feasible in order to promote more AM stations. At that juncture, the Commission was convinced that any departure from its regulatory framework governing allocation of AM broadcast spectrum would threaten this overriding purpose.

Circumstances have changed dramatically in the forty years since *Helm Coal Co.* The allocation scheme has resulted in the desired service expansion. Today there are approximately 4900 AM broadcast stations. Opportunities for new stations are now limited, except in the more remote areas of the United States. The maturation of the AM service and the growth in FM stations, now numbering in excess of 5300, have brought multiple full time aural services to virtually the entire country. With these developments, our task has shifted to assuring the optimal use of the AM band for new stations or for improved service to the public from existing stations. Thus we review Birach's proposal in light of our concern that this remaining AM spectrum be used efficiently.

Birach's filing shows that its obligation to protect the Canadian clear channel station with which it shares its daytime frequency, 690 kHz, effectively precludes Birach's use of the channel to provide nighttime service. Birach also shows that the preexisting operation of a full-time Canadian licensee on the adjacent domestic clear channel, 680 kHz, effectively precludes use of that channel for daytime broadcasting in the Detroit area. The pattern of past allocations made by this Commission and the Canadian government, however, would permit Birach's use of 680 kHz for nighttime service. The use of 680 kHz for nighttime service in tandem with use of 690 kHz for daytime service would make more efficient use of of valuable spectrum that would otherwise be idle. For this reason, Birach's proposal would further our policy of promoting optimal use of the residual AM spectrum.

In *Helm Coal Co., supra*, the licensee for KSPI had proposed a split frequency operation that would have precluded reuse of the requested frequency throughout the south central United States. The Commission gave this as a primary reason for rejecting that licensee's waiver request. The preclusive effect of Birach's using 680 kHz, however, is uncertain.[2] Birach has asserted that its use would not preclude the frequency's reuse elsewhere in the United States. Birach has offered no preclusion study to support this assertion and the staff has not attempted to prove or disprove its validity. As a general matter, the AM band is saturated and there are few opportunities for new stations on any of the current AM frequencies in the United States. With respect to 680 kHz specifically, Birach's assertion that its use will not impose additional limits on that frequency's reuse stands unchallenged, albeit unproven. At this point of time it appears reasonable to accept Birach's assertion that the preclusive effect of its operating on 680 kHz would be minimal. We note that Birach's application would be subject to our notice and cut-off procedure. By permitting competing applications and petitions to deny, this procedure offers an effective means of discovering whether the preclusion arising from Birach's operating on 680 kHz would, in fact, be minimal before we would decide whether a grant of the license Birach seeks would be in the public interest.[3]

Our commitment is to assure the public both diversity of programming and high quality AM service. *See, e.g., Notice of Proposed Rule Making* in *Policies to Encourage Interference Reduction Between AM Broadcast Stations*, MM Docket No. 88- (adopted February 22, 1989); *Notice of Proposed Rule Making* in *Enhanced Nighttime Operation for Class II - S and Class III - S AM Radio Broadcast Stations* (" *Enhanced Nighttime Operation* "), MM Docket No. 88-509, 3 FCC Rcd 6444 (1988); *Notice of Proposed Rule Making* in *Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, MM Docket No. 88-511, 3 FCC Rcd 6448 (1988); *Report and Order* in *Unlimited - time Operations by Existing AM Daytime - Only Radio Broadcast Stations; Discontinuance of Authorization of Additional Daytime-Only Stations; Minimum Power of Class III Stations ("Unlimited-time Operations")*, 2 FCC Rcd 7113 (1987) *Nighttime Operations on Canadian, Mexican and Bahamian AM Clear Channels ("Foreign Clear Channel Nighttime Operations")*, MM Docket No. 84-281, 50 Fed. Reg. 24515 (June 11, 1985), *modified on recon.*, 103 FCC 2d 532 (1986). Birach's proposal shows that for this licensee, daytime operation on 690 kHz and nighttime operation on adjacent channel 680 kHz would enable WNZK to operate as a fulltime AM station, making WNZK the first local fulltime station serving Dearborn Heights, Michigan and increasing by one the number of nighttime voices in the Detroit area. Thus granting a waiver of the single channel restriction in this case would further the Commission's policies of encouraging diversity of programming.

The protection obligations that Birach would bear as a condition of its operating on the clear channel of 680 kHz assure that a waiver in this case would not result in objectionable interference to and concomitant degradation of service for co-channel licensees on 680 kHz. This constitutes a significant distinction between the Birach proposal and the one presented by the licensee of WNOW and rejected by the Commission in *Helm Coal Co.*, 6 RR at 550.

In other proceedings, we have concluded that, because full time stations are better able to provide useful, consistently scheduled service, they are, on average, more valuable to the public and therefore to be encouraged. *See, e.g., Enhanced Nighttime Operation, supra; Unlimited-time Operations, supra.* Birach's proposal shows that for this licensee, daytime operation on 690 kHz and nighttime operation on adjacent channel 680 kHz would enable WNZK, as a fulltime station, to provide such better service. How many other daytime licensees would be able to achieve fulltime operation through similar split frequency arrangements is unknown. Since 1950, there have been no reported cases of Commission action on waiver requests similar to the one now before us. If our decision to grant Birach's request were to trigger many similar requests for authority to operate on split frequencies, concern about administrative efficiency would compel us to examine the more general question of whether changed circumstances warrant a change in our policy toward split frequency operation.

In summary, we find that granting Birach's waiver request will not undermine the policies underlying our allocation plan, and in particular, those policies underlying our decision to restrict AM licensees' operations to a single channel. It also appears to pose no threat to the certainty and administrative ease that strict application of our rules is designed to assure. Accord-

ingly, in light of the public interest benefits set forth above, we find good cause to grant Birach the waiver of Section 73.14 of our rules, 47 C.F.R. Section 73.14, required to make its application acceptable for filing. We also find that Birach's application, as amended,[4] is acceptable for filing and direct the staff of the Mass Media Bureau to reinstate the application and to issue the Notice of Acceptance for Filing that will trigger the time within which competing applications and petitions to deny may be filed.

Based on the foregoing, the Application for Review of Birach Broadcasting Corporation IS GRANTED and the requested waiver of Sections 73.14 and 73.3516(a) of the Commission's rules, 47 C.F.R. Sections 73.14, 73.3516(a), IS GRANTED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Birach assumed that any station more than 200 miles from the Canadian border that operates on one of the Canadian clear channels could easily design an antenna array to protect the dominant station and any other stations operating on the frequency and, therefore, would have no need to operate on the first adjacent channel at night.

[2] Clearly all stations have some preclusive effect. Our concern is that a proposal not preclude a better or higher-valued operation on the channel or an adjacent channel. In Birach's case, examples of such better or higher-valued operation could include: (1) a full time station operating on 680 kHz or an adjacent channel; (2) multiple operations on such channels; or (3) nighttime service to a white or gray area over such channels.

[3] We note that Section 73.3516(a) of the Commission's rules, 47 C.F.R. Section 73.3516(a), limits an application for facilities in the AM broadcast service to one frequency or channel, and states that no application will be accepted if it requests an alternate frequency or channel. This rule, first adopted and applied to AM broadcast service applications by the Federal Radio Commission, exists to assure that the Commission and other licensees already operating on a specific frequency are placed on notice of a request for a new assignment that may substantially affect those preexisting operations. *See Chicago Federation of Labor v. Federal Radio Commission*, 41 F. 2d 422, 423-24 (D.C. Cir. 1930). As stated above, Birach's application will be fully subject to our notice and cut-off procedure and all licensees operating on channels potentially affected by its split frequency proposal will thus receive notice of its filing. Moreover, granting a waiver of the single channel restriction in Section 73.3516(a) would in this case further the Commission policy of encouraging programming diversity. Thus we conclude that although Birach's application proposes operation on two frequencies, in this case waiver of Section 73.3516(a) is justified.

[4] On May 24, 1988, Jacor Broadcasting of Cincinnati, Inc., filed an informal objection to WNZK's request for an increase in daytime power. Jacor claimed that the proposal would result in significant prohibited overlap with Station WLW's 0.5 mV/m daytime contours. On September 16, 1988, Birach filed an amendment to its application which reduced the daytime power specified in its original application and changed the proposed radiation pattern to eliminate the prohibited contour ovelap. Thereafter, on September 20, 1988, Jacor withdrew its informal objection.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of Amendment of
the Commission's Rules for Rural
Cellular Service

FOURTH ORDER ON RECONSIDERATION

Adopted: May 8, 1989; Released: May 22, 1989

By the Commission:

INTRODUCTION

1. The Cellular Telecommunications Industry Association (CTIA) has submitted a Petition for Reconsideration of the Commission's *Fourth Report and Order*, 64 Rad. Reg. 2d (P&F) 1391 (1988). Thomas Domencich, Inc. (TDI) filed an opposition, and CTIA filed a reply. Prior to the *Fourth Report and Order*, the Commission, in the *Third Notice of Proposed Rule Making*, 53 Fed. Reg. 5020 (1988) (*Third Notice)* in this proceeding, requested comment on its proposal to strengthen its requirements for submitting evidence of the financial qualifications of applicants for rural cellular licenses in order to prevent the filing of speculative applications. The *Fourth Report and Order* set forth, *inter alia*, that non-wireline rural cellular applicants file with their application for each market a demonstration that they either had the funds available or obtained a firm financial commitment of funds sufficient to cover the costs of construction, operation, and other initial expenses for one year. In imposing this requirement, the Commission provided that non-wireline applicants may use a single firm financial commitment for all applications filed, but could do so only in accordance with certain specific requirements.

CONTENTIONS OF PARTIES

2. CTIA asserts that modification of the firm financial commitment rules in the *Fourth Report and Order* eases financial qualifications for non-wireline applicants for Rural Service Areas (RSAs) and thereby encourages the filing of speculative applications. The effect of the rules adopted, says CTIA, is inconsistent with the Commission's expressed objective of maintaining the integrity of its licensing processes by "limiting applicants to those who sincerely intend to provide high quality cellular service." *Fourth Report and Order*, *supra*, at para. 2. CTIA contends that the Commission disregarded suggestions of the cellular industry that were made in the comments filed in response to the *Third Notice* and abandoned its effort to ensure that applicants for RSA cellular licenses are qualified. CTIA asserts that the following provisions of the *Fourth Report and Order* foster speculation and remove the necessity of demonstrating financial qualifications. These provisions are that (1) a financial commitment by a third party may be contingent upon winning the lottery, (2) such commitment need not be market specific, and (3) if the funds are insufficient to cover the number of markets won, the applicant may subsequently provide an additional financial showing within 30 days of the date of public notice announcing the applicant as the tentative selectee for a market.[1] According to CTIA, by taking this action the Commission has declined to require that an applicant demonstrate its ability to build and operate each system for which it applied. Rather than achieving the Commission's goal, the revised rules, argues CTIA, may instead provide an incentive for speculators to file more applications because one financial commitment may be used to support applications for all 428 RSA markets. CTIA urges that the Commission upon reconsideration revise its rules to provide that an applicant must provide a separate showing of financial ability to construct and operate each market for which it applies.

3. TDI responds that requiring an applicant to obtain a firm financial commitment for every market in which it files would be unreasonably expensive for the applicant and economically inefficient for financial institutions. TDI argues that although the cost of obtaining a financial commitment for one market is relatively minor compared to the total cost of constructing and operating a system, the total cost of obtaining financial commitments for all 428 RSAs would be unduly burdensome to all but the most wealthy applicants. TDI assumes that the cost to obtain a firm financial commitment for one RSA would be approximately 1% of an estimated total cost of $750,000 for constructing and operating a one cell system for one year.[2] For an applicant applying for all 428 RSAs, TDI then calculates that the total costs to obtain separate firm financial commitments for each market would exceed $3 million. TDI submits that such a cost is unproductive for the cellular industry because it could otherwise be applied to improve and expand service.

4. In addition, TDI alleges that CTIA's approach is unreasonable and unfair. TDI argues that CTIA's petition was filed when most applicants had already obtained and paid for firm financial commitments as required by the rules adopted in the Order. TDI asserts that the financial institutions have already reviewed applicants' financial data and issued loan commitment letters, and that if the rules were changed now, the loan commitment letters would become invalid. Thus, according to TDI, it would be unreasonable for the Commission to now require financial institutions to review again applicants' financial data and issue new commitment letters. Moreover, argues TDI, the CTIA petition is procedurally deficient because it merely reiterates arguments previously made in the comments to the *Third Notice* and, therefore, should be dismissed.

5. CTIA replies that TDI's arguments concerning unreasonable and unproductive total costs to obtain separate firm financial commitments are based on the assumption that applicants who file 428 RSA applications actually intend to construct and operate cellular systems in markets in which they win lotteries. This assumption is erroneous, says CTIA, because the licensing process for the Metropolitan Statistical Areas (MSAs) has shown that an overwhelming number of applicants who became tentative selectees have sold their construction authorizations to legitimate cellular operators and that only very few tentative selectees actually constructed and operated cellular systems. CTIA maintains that a "legitimate applicant" is

one who selects and files for a market where he truly intends to construct and operate a cellular system. By allowing speculators to apply for all 428 markets based on one financial showing, says CTIA, the Commission is placing a severe disadvantage on legitimate applicants who truly intend to provide service to markets for which they have applied.

DISCUSSION

6. We deny CTIA's petition for reconsideration. The thrust of CTIA's argument is that, when the Commission permitted non-wireline applicants to use one firm financial commitment for all of their applications, it encouraged the filing of speculative applications. CTIA's petition does not demonstrate that there is a factual basis for that conclusion. In the *Fourth Report and Order*, *supra*, at para. 22, the Commission stated that the same financial commitment could be used in applying for more than one market. In adopting this proposal the Commission accepted the contention of those commenters who stated that requiring separate firm financial commitments for each market would require an applicant to incur an unreasonable expenditure of funds and that even large companies filing applications would have difficulty obtaining commitments for all of the RSAs for which they applied. *Id.* at para. 20, 22. The Commission concluded that this argument was valid but modified the proposal by adopting specific requirements to assure that applicants have thoroughly considered the financial viability of each RSA proposal and are serious about providing cellular service in each of the markets for which they apply.

7. The financial requirements we adopted assure that "applicants will undertake a thorough analysis of their proposals and will therefore deter speculation." *Id.* at para 22. We required that the firm financial commitment must be sufficient to cover the costs of any one of the proposed RSA systems. *See* Section 22.917 (c) of the Rules, as amended. The Common Carrier Bureau clarified this aspect of the adopted rules in *Public Notice*, DA 88-993 (released June 28, 1988), stating that the firm financial commitment must be sufficient "to cover the costs associated with any application owned by that applicant which is selected in the lottery." Consequently, applicants are required to analyze the markets they wish to serve and ensure that their financial commitment covers the most expensive proposal.

8. Other specific requirements are intended to assure that the financing for RSA proposals is based upon a close assessment of the markets applied for with applicants responsible for examining in detail the viability of each of their RSA proposals. If applicants obtain a commitment contingent on winning a lottery, the lender must examine the creditworthiness of the individual applicants and the financial viability of each of their proposed systems.[3] The lender's willingness to make the commitment must be based solely on its relationship with the applicant. *See* Section 22.917 (c) (5). Accordingly, we reject CTIA's arguments and reaffirm our finding that the RSA financial commitment requirements do have a deterrent effect on speculation by making it more difficult for applicants to demonstrate their financial qualifications than in the MSA markets.

9. Furthermore, we find that implementation of CTIA's proposal would have had an adverse effect on our handling of the filing of RSA applications. By the time the full pleading cycle had ended with CTIA's reply pleading, the first four rounds for filing RSA applications had occurred.[4] Providing sufficient notice for applicants to comply with a revised firm financial standard would have delayed the filing of RSA cellular applications for subsequent filing rounds. Accordingly, the revision would have severely disrupted and delayed our processing of applications that had been filed. Such consequences clearly outweigh the threat to our licensing process that has been alleged by CTIA.

10. Lastly, with the addition of the new paragraph (c) in Section 22.917 in the *Fourth Report and Order*, *supra*, we redesignated former paragraphs (c) and (d) as (d) and (e) respectively. Also, we are amending Section 22.917 (a)(3) and Section 22.917 (e) of the rules to reference paragraph (d), not (c). We are also amending Section 22.917 (a)(3)(iii)(A) to reference paragraph (e) instead of (d). We hereby find that because these rule amendments which clarify our rules are non-substantive, the notice and comment provisions as well as the effective date requirements of the Administrative Procedure Act are inapplicable. Accordingly, these rule amendments are effective immediately.

ORDERING PARAGRAPHS

11. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Cellular Telecommunications Industry Association (CTIA) IS DENIED.

12. Accordingly, IT IS ORDERED That, Sections 22.917 (a)(3) and 22.917 (e) are amended as set forth below and will be effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Rule Change

Part 22 of 47 CFR is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.917 (a)(3) is amended by removing the reference to "paragraph (c)" and adding in its place "paragraph (d)". Section 22.917 (a)(3)(iii)(A) is amended by removing the reference to "paragraph (d)" and adding in its place "paragraph (e)" to read as follows:

Section 22.917 Demonstration of Financial Qualifications

(a) * * *

(3) Except as provided in paragraph (d) of this section, * * *

* * * * *

(iii) * * *

(A) * * *, and a statement that paragraph (e) of this section is complied with; and

* * * * *

3. Section 22.917 (e) is amended by removing the reference to "paragraph (c)" and adding in its place "paragraph (d)" to read as follows:

Section 22.917 Demonstration of Financial Qualifications

* * * * *

(e) * * * In addition to the disclosures required by paragraph (d) of this section, * * *

* * * * *

FOOTNOTES

[1] *See* Section 22.917 (c), as amended.

[2] $750,000 is the Commission's benchmark figure for the cost of a one cell RSA system. Fourth Report and Order, *supra*, at note 7.

[3] For non-contingent financing, *see* Public Notice, Report No. CL-88-142, "Common Carrier Public Mobile Services Information, Further Clarification of Fourth Report and Order," released, August 8, 1988.

[4] The fourth RSA filing round terminated August 5, 1988. CTIA's reply pleading was received August 8, 1988. Almost 30,000 non-wireline applications for 48 RSA markets had been received.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review of

FRANK DiRICO d/b/a TWO WAY RADIO SERVICE 7320-02/L-2216

100 Marion Drive
Kingston, Massachusetts 02364

Licensee of Specialized Mobile
Radio Station KNHH-547

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1989; Released: May 22, 1989

By the Commission:

I. INTRODUCTION

1. Frank DiRico d/b/a Two Way Radio Service (Two Way) seeks review of a Private Radio Bureau action recovering, for failure to meet applicable loading requirements, two of five channels authorized Specialized Mobile Radio (SMR) station KNHH-547, in the Boston, Massachusetts area.[1]

II. BACKGROUND

2. Former Section 90.631(b) of our Rules,[2] which governed Two Way's license, required that SMR stations located in geographic areas where all 800 MHz channels were assigned, be loaded to 60 mobiles per channel within three years of initial license grant. If this standard was not met, authorization for channels not loaded to 100 units cancelled automatically. Two Way's license for station KNHH-547 was granted on December 22, 1983, making its three-year anniversary date December 22, 1986. By letter of February 11, 1987, the Private Radio Bureau (Bureau) notified Two Way that Bureau records indicated 261 1/2 mobile and control stations were authorized to operate on axdKNHH-547 as of the three year anniversary date. Because all available channels in the Boston area were assigned and because the 261 1/2 units fell below the 300 unit requirement for a five channel system, the Bureau stated that it had recovered two channels for reassignment and left Two Way a three-channel authorization.

3. Two Way sought reconsideration of this action, arguing that the Bureau's calculations failed to take into account end-users who had filed applications prior to the loading deadline and had units actually operating on the system on that date. The Bureau rejected Two Way's showing because of deficiencies in its documentation, which consisted of form statements from purported end-users presented on plain sheets of paper.[3] The Bureau informed Two Way by letter of May 21, 1987, that credit could be awarded only where statements were submitted on the end-user's business letterhead and contained "a brief description of the company's activities, the number of individuals employed by the company, the number of vehicles routinely operated by the company, the number of units in operation on each station and the dates these units became operational."[4] The Bureau also asked Two Way to provide clients' invoices evidencing the purchase and installation of each unit claimed.

4. Two Way's response to the Bureau was a June 10, 1987, letter from its counsel claiming that much of the information sought was already in the Commission's possession. Two Way maintained that its initial showing constituted a *prima facie* case for retaining its frequences and questioned the need for the documentation requested by the Bureau.[5]

5. Subsequent to Two Way's letter, the Bureau instituted an inspection of three of the six end-users which Two Way claimed had filed applications prior to the loading deadline and had units actually in operation at the deadline. The results of this inspection, which were furnished counsel for Two Way, revealed that Two Way's loading claims were inaccurate, and that actual figures were in fact lower than those submitted and below the 300 unit total required for retention of all five channels. Citing the results of its inspection and Two Way's failure to document loading claims in accordance with Commission requirements, the Bureau by letter of February 1, 1988, denied the request for reconsideration. This application for review followed.

III. APPLICATION FOR REVIEW

6. Two Way argues first in support of its application that it in fact satisfied the three year loading requirement. It points in particular to one of the end-users whose statements were submitted with its original showing and who was subsequently included in the Bureau's investigation. When this company's official, one Robert Feinberg of Bay State York, told Commission investigators that he had no units operational on Two Way's system on the three-year anniversary date, the Bureau declined to award Two Way the credit it had claimed. Two Way maintains here that it was entitled to rely upon the signed statement of an end-user, itself also a Commission licensee, in demonstrating satisfaction of its loading requirements. Two Way contends further that a discrepancy between written and oral statements requires, at a minimum, further investigation rather than immediate cancellation of channel authorizations.

7. Two Way asserts next that a recovery of channels is inequitable in light of the Commission's elimination of the three-year loading requirement in its *Report and Order*, PR Docket No. 86-404, *supra*. This is particularly true, Two Way argues, where the licensee "missed" its total loading requirement by a small number of units.

8. As a final ground for review, Two Way cites the length of time between initial notice of cancellation and denial of its petition for reconsideration. During this period, business demands compelled it to continue marketing and promoting its system, Two Way asserts, and it now serves approximately 550 end-users. Two Way con-

tends that some of these users are public safety entities whose operations would be severely disrupted by a loss of channels.

IV. DISCUSSION

9. We are unpersuaded by Two Way's arguments that the three year loading standard should not apply in the instant case. Two Way's license, when granted, was conditional upon compliance with specified loading requirements. "An FCC licensee takes its license subject to the conditions imposed on its use . . . . Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations." *P & R Temmer v. FCC*, *supra*., 743 F2d at 928. When Two Way failed to meet these loading conditions, authorization for two of its channels cancelled automatically. The cancellation permits the recovery of these two channels for reassignment to applicants in the Boston, Massachusetts area who wish to apply for this limited spectrum. In this regard, we note that there are currently 71 applicants on the Commission's 800 MHz waiting list in the Boston vincinity. Some of these applicants have been waiting as long as 5 years for 800 MHz channels. *See Business Radio Communications, Inc.*, 102 FCC 714, 716-17 (1985).

10. We are likewise unpersuaded by Two Way's claimed credit, for loading purposes, of the mobile units of end-user Bay State York. Were the issue one of Two Way's good faith in claiming those units, the signed statement would carry great weight. The question before us, however, is not one of intentions but of utilization. When Two Way attempted, early in this proceeding, to claim loading credit for end-users who were operational but unlicensed on its system, the Bureau provided it a specific description of the documentation required. Two Way has refused to meet those standards. Rather than verifying its own loading figures, Two Way has attempted to create questions. Two Way has been given ample notice of its obligations, ample opportunity to fulfill them, and has not adequately responded.

11. Turning next to our recent elimination of the three year loading requirement, we stated specifically in our *Notice of Proposed Rule Making*, PR Docket No. 86-404, 1 FCC Rcd 809 (1986), that "[a]lthough we are proposing to eliminate loading standards, we will continue to enforce them during the pendency of this proceeding."[6] 1 FCC Rcd at 813. Our recovery of Two Way's channels constituted just such an enforcement action, taken after the *Notice* was released but before the amended rules were formally adopted.[7] It was thus entirely consistent with the Notice and was both reasonable and equitable.[8]

12. As for Two Way's general assertion of prejudicial delay, the record does not support such a finding. The eleven months that elapsed between Two Way's filing of its petition for reconsideration and the Bureau's denial of that request were taken up with discussions concerning documentation of Two Way's loading claims and with Bureau inspections and audits of these submissions. Two Way makes no specific assertion of undue delay on the Bureau's part in conducting these discussions and inspections and we find no independent evidence to that effect. In this regard, Two Way's actions after the loading deadline had passed offer no basis for relief. Having failed to comply with our loading requirements, Two Way proceeded to operate at its own risk and can claim no equities from its efforts. *See e.g. Aeronautical Radio, Inc.*, DA-1851, released December 7, 1988; *Texas Two - Way, Inc.*, 98 FCC 2d 1300, 1304 (1984), *aff'd sub nom. Texas Two Way, Inc. v. FCC*, 762 F.2d 138 (D.C Cir. 1985) (Table).

13. We turn finally to Two Way's assertion that its users include public health and safety entities and that, therefore, it should retain the channels. Two Way is licensed as an SMR operation. Its channels are not allocated specifically for public health and safety use. Two Way does not establish that public health and safety entities cannot be served on its remaining channels or by others. Nor does it demonstrate public safety efforts sufficiently large in scope or unique in character to justify the extraordinary relief requested. Emergency assistance incidental to other uses does not alone justify relief from loading requirements. *See Aeronautical Radio Inc., supra.*

V. CONCLUSION

14. Two Way has furnished no evidence demonstrating that the Private Radio Bureau erred when it recovered two channels authorized station KNHH-547. We conclude, therefore, that the Bureau's decision should be affirmed.

15. Accordingly, IT IS ORDERED, that the Application for Review filed by Frank DiRico d/b/a Two Way Radio IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Application for Review is unopposed.

[2] This provision was deleted by our Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), *aff'd* FCC 88-392, released January 4, 1989, which became effective upon publication in the Federal Register on April 13, 1988, 53 Fed. Reg. 12154.

[3] Each statement failed to contain the address, phone number or job title of the individual providing the information.

[4] This information is routinely requested to resolve loading discrepancies.

[5] Two Way maintains that the Bureau's failure to respond to its June 10, 1987, letter was inappropriate. Two Way's Application for Review at para. 12. This letter, however, did not request a response. It merely conveyed Two Way's disinclination to provide the requested documentation on the basis of its assertion that the Commission already possessed sufficient information.

[6] Thus, our elimination of the three year loading standard was prospective in nature. It was based on our conclusion that new 900 MHz SMR systems would create intense competition for customers and make it difficult to meet the three-year loading deadline in the future. 3 FCC Rcd at 1846. Elimination of this loading requirement was not intended to apply to those SMR licensees, such as Two Way, that had already failed to satisfy this standard.

[7] *See* n. 2, *supra.*

[8] We conclude, as a result, that Two Way suffered no prejudice from the Bureau's failure to respond to a January 22, 1988, request that it withhold action here until PR Docket No. 86-404 was completed.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Local Exchange Carriers' Individual
Case Basis DS3 Service Offerings

The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company — Transmittal No. 239

Revisions to Tariff F.C.C. No. 1

SECOND SUPPLEMENTAL ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: May 10, 1989; Released: May 11, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 28, 1988, this Bureau released an Order initiating an investigation of a number of local exchange carriers' (LECs') proposed Individual Case Basis (ICB) rates and charges for Special Access DS3 and DS3 equivalent services.[1] That Order designated issues for investigation concerning the LECs' continued use of ICB rates and established a pleading cycle. The *Designation Order* also granted the LECs special permission to advance the effective date of their pending ICB filings which became effective subject to the outcome of this investigation. We have since initiated two further rounds of pleadings in this investigation. First, we designated additional issues for investigation and required direct cases concerning the LECs' use of ICB rates for "dark" fiber.[2] We later issued a public notice inviting comment on the extent of competition for DS3 services.[3]

2. As part of their annual access tariff filings, five of the Regional Bell Operating Companies (BOCs) filed tariff provisions that introduce general rates for DS3 service.[4] We made these filings subject to the outcome of this investigation.[5] In the interim, the Ameritech Operating Companies (Ameritech) and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) have filed general DS3 tariff provisions. Ameritech's general tariff has since become effective, also subject to the outcome of this investigation.[6] In this Order, we add the US West general DS3 tariff to this investigation, designate additional issues for investigation of the BOCs' general DS3 tariffs, and establish a pleading cycle. We also suspend for one day US West's Transmittal No. 239, its pending general DS3 offering, and direct US West to keep accurate account of all amounts received thereunder.

II. BACKGROUND

3. We observed in the *Designation Order* that the Commission's initial decision to allow ICB rates was conditional on the eventual development of averaged rate schedules and the elimination of ICB rates. The Commission allowed the use of ICB rates for certain services that telephone companies had not previously offered but cautioned that it expected rates and regulations for such services to be described in the relevant tariff as they were developed.[7] In order to determine whether the continued use of ICB rates for DS3 service was lawful, we designated the following issues for investigation:

> (1) Should the local exchange carriers be required to offer DS3 services under a non-discriminatory averaged schedule of rates pursuant to Sections 201-203 of the Communications Act?
>
> (2) Is ICB pricing of DS3 services unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable services?
>
> (3) Do the rates for DS3 service set by the local exchange carriers on an ICB basis constitute a justifiable volume discount in relation to the rates for DS1 and voice grade services? Local exchange carriers should address differences in rate relationships when similar facilities for voice grade, DS1, and DS3 services are employed. In addition, local exchange carriers should show how any differences between minimum service periods, termination liabilities, and any accelerated cost recovery over the relevant time period (front loading of costs) affect the rate relationships.[8]

4. In the *Supplemental Designation Order* we directed the LECs to

> (1) Explain whether the provision of dry fiber cable could or should be distinguished from the provision of DS3 and DS3-equivalent services with respect to the use of ICB rates.
>
> (2) Provide responses to the issues set out in the *Designation Order* . . . as applied to dry fiber cable.
>
> (3) If you contend that the issues in the *Designation Order* do not apply to the provision of dry fiber cable, provide a detailed explanation to support your position.[9]

III. DISCUSSION

5. The parties to this investigation have provided extensive discussion of the issues that have been designated to date. As we stated in the *1989 Access Tariff Order*, we regard the BOCs' general DS3 tariffs as an important step forward in addressing these issues. Nevertheless, we concluded in that Order that these tariffs do not completely resolve the issues in the present investigation and, indeed, present other questions that warrant investigation.[10] First, although all of the BOCs now have filed general rates for at least some DS3 rate elements, the BOCs still retain ICB rates in certain circumstances. As we noted, the BOCs continue to provide DS3 service arrangements that predate their general tariffs pursuant to ICB rates. In addition, various carriers continue to offer one or more DS3

rate elements on an individual case basis or to charge ICB rates for all DS3 rate elements under certain circumstances.[11]

6. In contrast, we observed, Bell Atlantic's tariff contains what we considered to be a suitable rate structure for a general DS3 offering. We stated that the tariff appeared to be sufficiently general in scope because it applies general rates to both channel terminations and channel mileage elements and because it avoids the inclusion of any ICB arrangements under the guise of a purportedly general offering. We therefore stated that we would limit the investigation of Bell Atlantic's tariff to the issue of the appropriateness of grandfathered rates.[12] We also noted that BellSouth's tariff includes an averaged rate structure for DS3 local channels but that it provided channel mileage on an individual case basis.[13] BellSouth now states that its tariff includes two DS3 service offerings. BellSouth concedes that its Point-to-Point Service is offered solely with ICB rates, but that its Networking Service is offered via a general tariff and has been for some time. BellSouth urges us not to include its averaged rates for DS3 Networking Service in this investigation.[14] As the *1989 Access Tariff Order* stated, only BellSouth's ICB Point-to-Point rates are subject to this investigation.

7. Based on the foregoing, we designate the following issues for investigation:

(1) Is the continued use of ICB pricing for DS3 customers who commenced service prior to April 1, 1989, unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable service?

(2) Is the continued use of ICB pricing for one or more rate elements (*i.e.*, channel terminations, channel mileage) unreasonably discriminatory?

(3) Is the continued use of ICB pricing in the following circumstances unreasonably discriminatory?

(a) For customers ordering a particular number of DS3 services.

(b) For customers ordering DS3 circuits of a particular length.

(c) For customers ordering non-protected DS3 circuits.[15]

(d) For customers ordering DS3 service from a customer premises to an exchange access boundary. In addition, should the exchange access boundary be treated as a customer premises?

IV. PROCEDURAL REQUIREMENTS

8. The Bell Operating Companies are directed to file supplemental direct cases in response to these issues not later than June 9, 1989. In addition, other carriers whose ICB DS3 rates are subject to this investigation are invited to file supplemental direct cases at that time.[16] Each LEC's direct case must supply all information upon which it relies to support its position. Interested parties may file oppositions to the direct cases not later than June 23, 1989. Pleadings opposing the direct cases must be captioned "Opposition to Direct Case" or "Comments on Direct Case" and shall specifically identify the issue and the pleading to which it responds. Any affected LEC may file a "Rebuttal" to oppositions or comments no later than July 3, 1989. All pleadings must be organized to reflect the issues designated in this Order. In addition, all pleadings shall contain a brief summary of the filing party's previous pleadings filed in response to the *Designation Order*, *Supplemental Designation Order*, and *NCI Public Notice*. Such summaries shall include citations to the filing party's responses to earlier designated issues.

9. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200, *et seq.*, of the Commission's Rules, 47 C.F.R. § 1.1200, *et seq.*

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the issues set forth in Section III, *supra*, ARE DESIGNATED FOR INVESTIGATION in CC Docket No. 88-136.

11. IT IS FURTHER ORDERED that the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Transmittal No. 239 IS SUBJECT to the investigation instituted in CC Docket No. 88-136.

12. IT IS FURTHER ORDERED that the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Transmittal No. 239 IS SUSPENDED for one day.

13. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for the services which are the subject of the investigation established in Docket 88-136.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*).

[2] Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988) (*Supplemental Designation Order*). Dark fiber (also known as dry fiber) is unpowered. The provision of dark fiber cable does not involve supplying the electronics which will eventually power the cable.

[3] Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989) (*NCI Public Notice*).

[4] The five regional BOCs that filed general DS3 tariffs in the context of the annual filing are the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone Company (NYNEX), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern).

[5] *See* Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, DA 89-337, released Mar. 22, 1989, (*1989 Access Tariff Order*) *recon. & app. for review pending*, at paras. 537-539.

[6] Ameritech Operating Companies, DA 89-484, released Apr. 28, 1989. US West's general DS3 tariff, filed under Transmittal No. 239, is scheduled to become effective May 25, 1989, on 45 days' notice.

[7] *Designation Order*, 3 FCC Rcd at 2582 & n.3 (citing Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 97 FCC 2d 1082, 1143 (1983)).

[8] *Id.* at 2582.

[9] *Supplemental Designation Order*, 3 FCC Rcd at 6066.

[10] *1989 Access Tariff Order* at para. 537.

[11] For example, Pacific has introduced tariffed rates for DS3 channel mileage but continues to provide DS3 channel terminations on an individual case basis. *See 1989 Access Tariff Order* at para. 524. In contrast, Ameritech now offers tariffed rates for DS3 channel mileage and DS3 to DS1 multiplexing but continues to rate DS3 Local Distribution Channels (Ameritech's term for channel terminations) on an individual case basis. *See Ameritech DS3 Order* at para. 1. In addition, although Southwestern has implemented general rates for both channel terminations and channel mileage, it will charge ICB rates for both elements for DS3 circuits requiring channel mileage in excess of 20 miles. *1989 Access Tariff Order* at para. 519.

[12] *1989 Access Tariff Order* at para. 539.

[13] *Id.*

[14] Letter from EL Bush, Director Federal Regulatory, BellSouth, to Chief, Tariff Division, FCC dated Apr. 7, 1989.

[15] Protected DS3 circuits provide an alternative transmission path in the event service on the primary channel or channels is interrupted.

[16] We note that Cincinnati Bell Telephone Company, Contel Service Corporation, the GTE Telephone Operating Companies, the National Exchange Carrier Association, Southern New England Telephone Company, and United Telephone Sytem have filed ICB rates for DS3 service and that those rates have been suspended and included in this investigation. Although this supplemental designation Order is directed principally toward examining issues presented by the BOCs' general DS3 tariffs, all DS3 rates that have been included in this investigation are subject to any conclusions that the Commission may reach.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Ameritech Operating Companies	Transmittal Nos. 265, 266, 271, 275, 276, 277, 278, 279, 280, 282, and 289
Revisions to Tariff F.C.C. No. 2	

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1989; Released: May 3, 1989

By the Chief, Common Carrier Bureau:

1. By the captioned tariff revisions, which were filed between February 2, 1989, and March 21, 1989, the Ameritech Operating Companies (Ameritech) propose revisions to their access service tariff to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity offerings. The proposed revisions are currently scheduled to become effective between May 3, 1989, and June 11, 1989.[1]

2. On April 14, 1989, Ameritech filed an application for special permission in which it requests waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, in order to allow Ameritech to advance the effective date of the captioned tariff revisions.[2] Ameritech also proposes to conform the rates for certain cases with the rate structure and rate levels proposed in its Custom High Capacity Filing.[3] Ameritech notes that certain services described in the captioned revisions are unrelated to DS3 offerings and consequently are not affected by the generic DS3 tariff.

3. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LEC) proposed ICB rates and designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[4] The offerings proposed in Ameritech's various transmittals raise the same issues as those transmittals already subject to our *Designation Order*. Therefore, the transmittals will be subject to the outcome of that investigation.

4. Accordingly, IT IS ORDERED that the Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 265, 266, 271, 275, 276, 277, 278, 279, 280, 282 and 289 are subject to the investigation instituted in Docket 88-136.

5. IT IS FURTHER ORDERED that the Ameritech Operating Companies may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the remaining offerings contained in the captioned transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-324.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Ameritech Operating Companies shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for the services which are the subject of the investigation established in Docket 88-136.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We do not consider in this Order Transmittal No. 278, Section 12, or Transmittal No. 289, cases on page 450.3 for One Call Communications of SCI, Inc., and page 450.24 for MCI Telecommunications Corporation (Columbus, Indiana, to Bloomington, Indiana).

[2] Ameritech Operating Companies, Application No. 75, filed Apr. 14, 1989, as amended Apr. 24, 1989.

[3] *Id.* at 1. Ameritech's Custom High Capacity Filing, which was proposed under Transmittal No. 287, was suspended for one day and made subject to the ongoing investigation in Docket 88-136. Ameritech Operating Companies, DA 89-484, released Apr. 28, 1989.

[4] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989). The Bureau is also investigating certain generalized DS3 rate structures which took effect on April 1, 1989. *See* Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, DA 89-337, released Mar. 22, 1989, *recon. & app. for review pending*, at paras. 537-539.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company

Transmittal Nos. 245 and 248

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 1, 1989; **Released: May 1, 1989**

By the Chief, Common Carrier Bureau:

1. On April 27, 1989, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) filed the captioned tariff revisions which propose individual case basis (ICB) rates and charges for DS3 high capacity service cases, as well as a consolidation plan for DS3 services.[1] The proposed revisions are scheduled to become effective on May 2, 1989. The proposed revisions in Transmittal No. 245 allow customers to add to existing Specialized Service or Arrangement cases without incurring additional charges due to the new standard rate structure plan pending under Transmittal No. 239 for DS3 services. The revisions proposed in Transmittal No. 248 establishes several cases of DS3 service priced on an individual case basis. The proposed charges have the same structure and rate level as the standard rates and charges pending under Transmittal No. 239.

2. On March 28, 1989, the Bureau released an Order initiating an investigation of a number of local exchange carriers' (LECs) proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.[2] The ICB rates that US West proposes in its Transmittals No. 248 raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation.

3. Accordingly, IT IS ORDERED that the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 248 is subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, US West's tariff revisions in Transmittal No. 248 are suspended for one day. For this purpose we assign Special Permission No. 89-333.

5. IT IS FURTHER ORDERED that, pursuant to Section 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company shall keep accurate account of all amounts received pursuant to rates for DS3 services filed under their proposed revisions.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Company, Transmittal No. 245, filed Apr. 27, 1989 and Transmittal No. 248, filed Apr. 27, 1989.

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, 4 FCC Rcd 846 (1989). The Bureau is also investigating certain generalized DS3 rate structures which took effect on April 1, 1989. *See* Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, DA 89-337, released Mar. 22, 1989, at paras. 537-539.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS — Transmittal Nos. 1431 and 1552

Revisions to Tariff F.C.C Nos. 1, 2, 4, 7, 9, 11, 13, and 14

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1989; Released: May 4, 1989

By the Chief, Common Carrier Bureau:

1. By the captioned transmittals AT&T Communications (AT&T) proposes to introduce tariff provisions concerning promotional offerings.[1] Transmittal No. 1431 introduced a variety of promotions described very generally which were designed to attract new customers to several of its business services. These include reductions in monthly and/or usage charges for customers that order new business services; and/or waiver of monthly and nonrecurring charges for customers that order new business services.[2] Under Transmittal No. 1552 AT&T has proposed promotional offerings that are more specific in nature and limited to designated services. AT&T states that these offerings will be limited to an ordering window of no more than 90 days and no less than 30 days and will be subject to an annual $50 million cap on total expenditures. Under Transmittal No. 1431, AT&T also proposed to file tariff revisions within ten days after the end of the month in which a particular promotion was offered which would specify the promotions that had been offered and the dates and locations of their availability. Under Transmittal No. 1552, AT&T has revised this provision and now proposes to file in the tariff, to become effective on not less than five days' notice, the specific details of the promotions.[3]

2. AT&T describes generally the promotions that it intends to offer during the remainder of 1989 for its business services.[4] These may involve combinations of waivers of various monthly, usage, and nonrecurring charges.[5] In addition, AT&T's promotions will include either the "Guarantee I" or "Guarantee II" promotion.[6] AT&T states that a promotion will be generally available in an area no smaller than the region served by a Numbering Plan Area (NPA); in the case of promotions for SDN and Accunet T45 Service, however, the area of availability will be no smaller than a single state.[7] Customers that take service under one of AT&T's promotions may be required to maintain a minimum usage level or may be required to pay the charges waived under the promotion if requried revenue levels are not met.[8]

3. Seven parties filed petitions to reject or suspend and investigate Transmittal No. 1431.[9] IDCMA, MCI, and US Sprint also filed petitions to reject or suspend and investigate Transmittal No. 1552. AT&T filed replies to these petitions. Petitioners generally argue that the proposed tariff revisions are unlawfully discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Petitioners also contend that the tariff violates Section 203 of the Act, 47 U.S.C. § 203, and the Commission's tariff filing rules, 47 C.F.R. § 61.1 *et seq.*, in that the proposed tariff terms are not sufficiently definite. In addition, petitioners argue, the cost and demand projections provided by AT&T are flawed. In response, AT&T asserts that its proposed promotional tariff is consistent with the Commission's procompetitive policies and is not unlawful as petitioners allege. AT&T contends that its proposed tariff is consistent with Section 203 of the Act and, moreover, that it is not unreasonably discriminatory. Finally, AT&T argues, the cost and demand data supporting the captioned tariff revisions are fully consistent with Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

4. The Common Carrier Bureau has reviewed the tariff transmittals and the various pleadings. With one exception, we conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time. AT&T's proposed promotional tariff, as revised by Transmittal No. 1552, provides that the details of promotional offerings will be filed to be effective on five days' notice.[10] AT&T was granted authority under Special Permission No. 89-221, dated March 22, 1989, to file this provision in its tariff. In that grant the Chief, Tariff Division stated that "[t]his grant does not constitute approval by the Commission or Chief, Common Carrier Bureau of the proposed filing, and does not prejudice any subsequent action which the Commission or Bureau may take." After further consideration of this provision we conclude that a continuing waiver of this type is not warranted at this time. We therefore rescind our grant to the extent it applies to this particular provision. Rescission of this waiver renders this provision unlawful in that it violates Section 61.58(c)(3) of the Commission's Rules, 47 C.F.R. § 61.58(c)(3), which requires that tariff filings not specifically assigned a notice period by the Rules must be made on at least 35 days' notice. To the extent that the captioned tariff revisions provide for a notice period that is inconsistent with the Rules they must be rejected as patently unlawful.

5. Due to the limited nature of the promotional tariff filings that AT&T proposes to make, however, we will entertain, on a case-by-case basis, applications for special permission seeking waiver of Section 61.58 of the Rules for the purpose of filing, on less than 35 days' notice, the type of promotional offering that is outlined in Transmittal No. 1552. We believe that in most cases short notice will be sufficient to allow us to discharge our tariff review responsibilities.[11]

6. Accordingly, IT IS ORDERED that AT&T Communications, Inc. Transmittal Nos. 1431 and 1552 ARE REJECTED to the extent indicated in paragraph 4, *supra*.

7. IT IS FURTHER ORDERED that the petitions to reject or suspend and investigate filed by Cable and Wireless Communications, Inc., the Competitive Telecommunications Association, the Independent Data Communications Manufacturers Association, MCI Telecommunications Corporation, the National Telecommunications Network, Telefonica Larga Distancia, and US Sprint Communications Corporation ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

8. IT IS FURTHER ORDERED that AT&T Communiations SHALL FILE tariff revisions to remove the rejected material on not less than one day's notice. For this purpose, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 89-337.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T originally proposed promotional offerings under Transmittal No. 1431. Although this transmittal was not withdrawn, it is superseded, in its entirety, by Transmittal No. 1552.

[2] AT&T Tr. No. 1552, filed Mar. 22, 1989, Description and Justification (D&J) at 2-3.

[3] *Id.*

[4] These services include Megacom, Megacom 800, 800 ReadyLine, PRO WATS and PRO WATS I, II, and III, AT&T WATS and AT&T 800 Services, and Accunet T1.5 and Accunet T45 Services.

[5] AT&T Tr. No. 1552, D&J at 4-12.

[6] Under the Guarantee promotions, AT&T offers to pay the costs of returning a customer to its former service provider. The Guarantee I promotion allows the customer to reconvert after taking service for six months; the Guarantee II promotion is available within 90 days of installation of the AT&T service. *Id.* at 5, 8-9.

[7] *Id.* at 3, n. ****.

[8] *See, e.g., id.* at 6.

[9] The petitioners are Cable and Wireless Communications, Inc. (CWC); the Competitive Telecommunications Association (Comptel); the Independent Data Communications Manufacturers Association (IDCMA); MCI Telecommunications Corporation (MCI); the National Telecommunications Network (NTN); Telefonica Larga Distancia (TLD); and US Sprint Communications Corporation (US Sprint). In addition, ADAPSO filed a letter expressing its concerns and ITT Communications Services, Inc. (ITT) filed a letter endorsing Comptel's petition.

[10] *See, e.g.*, AT&T Tr. No. 1552, Section 8.1.1.G (details of Megacom promotions will be filed five days before the offer becomes effective). Similar provisions apply to the other AT&T services that are affected by AT&T's promotional tariff.

[11] We recognize that routine or blanket waivers of the Commission's Rules may eviscerate the general rule. We therefore conclude that a reexamination of the Rules to consider whether to reduce the required notice period for promotional filings may be warranted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SATELLITE CELLULAR SYSTEMS — File No. 10108-CL-P-674-A-88

For authority to construct and operate a Domestic Public Cellular Radio Telecommunications Service on frequency Block A in Utah Rural Service Area #2 - Morgan

MEMORANDUM OPINION AND ORDER

Adopted: May 12, 1989; Released: May 22, 1989

By the Chief, Common Carrier Bureau:

1. Satellite Cellular Systems (Satellite) is the first applicant randomly selected for the Utah 2 - Morgan rural service area (RSA) cellular license. The Mobile Services Division (MSD) dismissed Satellite's captioned application because the microfiche copy of its application was not included with its transmittal sheet.[1] Instead, the microfiche copies of another entity's (Signal Cellular Communications) application were associated with Satellite's transmittal sheet.[2] Satellite has filed a Petition for Reconsideration of the MSD's decision. No opposition to the Petition has been filed.

I. SATELLITE'S CONTENTIONS

2. Satellite argues that its application should be accepted for filing because its application was correct when filed with the Commission. It argues that its application preparer, The Cellular Corporation (TCC) "designed and implemented a specific system for application preparation and filing to ensure that no applicant would incur the problem that Satellite now faces." (Petition at 2.) Satellite describes the steps undertaken to prepare its application and provides affidavits from the individuals responsible for each step of the procedure. By explaining its procedures in this way, Satellite argues that it has established a "factual chain" demonstrating that its application was correctly filed, and that this comports with the holding in *City Cellular Telephone Company, Order on Reconsideration*, Mimeo No. 4236 (Com. Car. Bur., released May 2, 1986) ("*City Cellular* ").[3] Satellite further argues that the defect is minor, and the Commission should permit it to cure the defect.

II. DISCUSSION

3. Section 22.923(b)(5) of the Rules requires RSA applicants initially to file two microfiche copies of the applications with a transmittal sheet. The microfiche copies are an essential part of the information required for initial processing of cellular applications because without them there is no correct copy of the application on file. The "letter perfect" standard applies to certain specified pre-lottery filing requirements, among which are that each applicant for a cellular authorization is required to certify to the completeness of its application, state the applicant's name and the market name, market number and frequency block for which it was applying, and to provide two properly identified microfiche copies of its executed application at the time of filing. *Johnstown Cellular Communications Co.*, 1 FCC Rcd 1164 (Com. Car. Bur. 1986) ("*Johnstown* "), *aff'd. Jacksonville Cellular Telephone Company*, 3 FCC Rcd 5386 (1988). *See also Cellular Lottery Proceeding, First Reconsideration Order;* 58 Rad. Reg. 2d (P&F) 677, 696 (1985); *Pactel Mobile Access*, 1 FCC Rcd 564 (1986) ("*Pactel* "); In *Jacksonville*, the Commission specified that aspects of applications which are relied upon for initial intake processing could not be amended and if incorrect, would result in dismissal of the application as unacceptable for filing.

4. In *Pactel*, the Commission upheld the Common Carrier Bureau's dismissal of an application as unacceptable for filing because the market number printed on the application cover was not that of the market contained in the application. The Commission stated that:

> [i]n order to bring cellular service to the public quickly, there can be no delay associated with having the staff examine or pre-screen each application. Any application that would cause delay by requiring the staff to read through it in order to determine the relevant information was, and is, defective and therefore unacceptable for filing.

Pactel, 1 FCC Rcd at 565. Here, Satellite failed the letter perfect standard because it filed a copy of someone else's application with its transmittal sheet and thus has not provided its own application. Satellite states that its research shows Satellite's microfiche are associated with Signal Communication Company's transmittal sheet on file with the Commission. Satellite's argument that the Commission staff could simply associate the correct microfiche with its transmittal sheet is the same type of argument rejected by the Commission in *Pactel*. There, as here, improperly filed applications cause delay which hinders processing and results in unnecessary delay in providing cellular service to the public. Failure to comply with the letter perfect standard requires dismissal. *Id.*

5. Satellite argues that it is not responsible for this error. Satellite suggests that the Commission staff or personnel at Mellon Bank (the Commission's intake processors for rural cellular applications) must have disassociated Satellite's microfiche from its transmittal sheet. Notwithstanding Satellite's proffer of affidavits by its application preparer, the fact is that all applications arrive at the Commission's intake point in separate envelopes. The contents of each envelope are removed one envelope at a time, and clerks attach a label with the same fee number to the microfiches, the transmittal sheet, and the check contained in each envelope.[4] *See T. B. Hubbard, III*, Mimeo No. 4271 (Com. Car. Bur., released May 5, 1986). Accordingly, we conclude that Satellite filed its application in a defective condition.[5]

6. Moreover, we cannot agree with Satellite's argument that *City Cellular* holds that by establishing a "factual chain" of events connected with the application preparation, the applicant proves it filed an acceptable application. In *City Cellular*, the applicant filed photocopies of its application rather than the original application containing an original signature. The applicant admitted that it had inadvertently filed copies rather than the original but argued that the copies should have been accepted. The Bureau found that only original applications containing original signatures could be accepted. Accordingly, *City Cellular* is inapposite.

7. We find that Satellite failed to file a complete application and accordingly, the Mobile Services Division acted correctly in dismissing the application.

8. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the Petition for Reconsideration of Satellite Cellular Systems IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Applicants for an initial cellular license in the Rural Service Areas (RSAs) are required to submit two microfiche copies of their application accompanied by a transmittal sheet identifying *inter alia* the application by market name and number and the applicant's name. *See* Section 22.923 of the Rules.

[2] The dismissal letter stated in pertinent part:

> The applicant's name on the envelope containing the microfiche copy of the application was that of Signal Cellular Communications, as was the name on both copies of the microfiche application, while the name on the transmittal sheet was for Satellite Cellular Systems.
>
> Letter from Mobile Services Division, FCC to Betty Thompson, General Partner, Satellite Cellular Systems; reference number 63500-SLM, (December 8, 1988).

[3] *City Cellular* concerned a number of applications filed without original signatures due to an error of the preparer. *See* paragraph 6, *infra*.

[4] The fee number for Signal Communications Company, 9833392, is not adjacent to Satellite's fee number, 9832299. Fee numbers are assigned consecutively as envelopes are opened. The likelihood that Mellon Bank switched microfiche for applications, from the same preparer, 1,093 fee numbers apart is so low as to be not even a viable alternative theory.

[5] Of course, Satellite cannot rely on a mistake by its application preparer to reverse its dismissal in this case. *See* Section 22.923(b)(7); *see also City Cellular, Inc.*, *supra*.

COMMUNICATIONS

Revisions to Tariff F.C.C Nos. 1, 2, 4, 7, 9, 11, 13, and 14

Transmittal Nos. 1431 and 1552

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1989; Released: May 4, 1989

By the Chief, Common Carrier Bureau:

1. By the captioned transmittals AT&T Communications (AT&T) proposes to introduce tariff provisions concerning promotional offerings.[1] Transmittal No. 1431 introduced a variety of promotions described very generally which were designed to attract new customers to several of its business services. These include reductions in monthly and/or usage charges for customers that order new business services; and/or waiver of monthly and nonrecurring charges for customers that order new business services.[2] Under Transmittal No. 1552 AT&T has proposed promotional offerings that are more specific in nature and limited to designated services. AT&T states that these offerings will be limited to an ordering window of no more than 90 days and no less than 30 days and will be subject to an annual $50 million cap on total expenditures. Under Transmittal No. 1431, AT&T also proposed to file tariff revisions within ten days after the end of the month in which a particular promotion was offered which would specify the promotions that had been offered and the dates and locations of their availability. Under Transmittal No. 1552, AT&T has revised this provision and now proposes to file in the tariff, to become effective on not less than five days' notice, the specific details of the promotions.[3]

2. AT&T describes generally the promotions that it intends to offer during the remainder of 1989 for its business services.[4] These may involve combinations of waivers of various monthly, usage, and nonrecurring charges.[5] In addition, AT&T's promotions will include either the "Guarantee I" or "Guarantee II" promotion.[6] AT&T states that a promotion will be generally available in an area no smaller than the region served by a Numbering Plan Area (NPA); in the case of promotions for SDN and Accunet T45 Service, however, the area of availability will be no smaller than a single state.[7] Customers that take service under one of AT&T's promotions may be required to maintain a minimum usage level or may be required to pay the charges waived under the promotion if requried revenue levels are not met.[8]

3. Seven parties filed petitions to reject or suspend and investigate Transmittal No. 1431.[9] IDCMA, MCI, and US Sprint also filed petitions to reject or suspend and investigate Transmittal No. 1552. AT&T filed replies to these petitions. Petitioners generally argue that the proposed tariff revisions are unlawfully discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Petitioners also contend that the tariff violates Section 203 of the Act, 47 U.S.C. § 203, and the Commission's tariff filing rules, 47 C.F.R. § 61.1 *et seq.*, in that the proposed tariff terms are not sufficiently definite. In addition, petitioners argue, the cost and demand projections provided by AT&T are flawed. In response, AT&T asserts that its proposed promotional tariff is consistent with the Commission's procompetitive policies and is not unlawful as petitioners allege. AT&T contends that its proposed tariff is consistent with Section 203 of the Act and, moreover, that it is not unreasonably discriminatory. Finally, AT&T argues, the cost and demand data support-

ing the captioned tariff revisions are fully consistent with Section 61.38 of the Commission's Rules. 47 C.F.R. § 61.38.

4. The Common Carrier Bureau has reviewed the tariff transmittals and the various pleadings. With one exception, we conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time. AT&T's proposed promotional tariff, as revised by Transmittal No. 1552, provides that the details of promotional offerings will be filed to be effective on five days' notice.[10] AT&T was granted authority under Special Permission No. 89-221, dated March 22, 1989, to file this provision in its tariff. In that grant the Chief, Tariff Division stated that "[t]his grant does not constitute approval by the Commission or Chief, Common Carrier Bureau of the proposed filing, and does not prejudice any subsequent action which the Commission or Bureau may take." After further consideration of this provision we conclude that a continuing waiver of this type is not warranted at this time. We therefore rescind our grant to the extent it applies to this particular provision. Rescission of this waiver renders this provision unlawful in that it violates Section 61.58(c)(3) of the Commission's Rules, 47 C.F.R. § 61.58(c)(3), which requires that tariff filings not specifically assigned a notice period by the Rules must be made on at least 35 days' notice. To the extent that the captioned tariff revisions provide for a notice period that is inconsistent with the Rules they must be rejected as patently unlawful.

5. Due to the limited nature of the promotional tariff filings that AT&T proposes to make, however, we will entertain, on a case-by-case basis, applications for special permission seeking waiver of Section 61.58 of the Rules for the purpose of filing, on less than 35 days' notice, the type of promotional offering that is outlined in Transmittal No. 1552. We believe that in most cases short notice will be sufficient to allow us to discharge our tariff review responsibilities.[11]

6. Accordingly, IT IS ORDERED that AT&T Communications, Inc. Transmittal Nos. 1431 and 1552 ARE REJECTED to the extent indicated in paragraph 4, *supra*.

7. IT IS FURTHER ORDERED that the petitions to reject or suspend and investigate filed by Cable and Wireless Communications, Inc., the Competitive Telecommunications Association, the Independent Data Communications Manufacturers Association, MCI Telecommunications Corporation, the National Telecommunications Network, Telefonica Larga Distancia, and US Sprint Communications Corporation ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

8. IT IS FURTHER ORDERED that AT&T Communiations SHALL FILE tariff revisions to remove the rejected material on not less than one day's notice. For this purpose, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 89-337.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock

Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T originally proposed promotional offerings under Transmittal No. 1431. Although this transmittal was not withdrawn, it is superseded, in its entirety, by Transmittal No. 1552.

[2] AT&T Tr. No. 1552, filed Mar. 22, 1989, Description and Justification (D&J) at 2-3.

[3] *Id.*

[4] These services include Megacom, Megacom 800, 800 ReadyLine, PRO WATS and PRO WATS I, II, and III, AT&T WATS and AT&T 800 Services, and Accunet T1.5 and Accunet T45 Services.

[5] AT&T Tr. No. 1552, D&J at 4-12.

[6] Under the Guarantee promotions, AT&T offers to pay the costs of returning a customer to its former service provider. The Guarantee I promotion allows the customer to reconvert after taking service for six months; the Guarantee II promotion is available within 90 days of installation of the AT&T service. *Id.* at 5, 8-9.

[7] *Id.* at 3, n. ****.

[8] *See, e.g., id.* at 6.

[9] The petitioners are Cable and Wireless Communications, Inc. (CWC); the Competitive Telecommunications Association (Comptel); the Independent Data Communications Manufacturers Association (IDCMA); MCI Telecommunications Corporation (MCI); the National Telecommunications Network (NTN); Telefonica Larga Distancia (TLD); and US Sprint Communications Corporation (US Sprint). In addition, ADAPSO filed a letter expressing its concerns and ITT Communications Services, Inc. (ITT) filed a letter endorsing Comptel's petition.

[10] *See, e.g.*, AT&T Tr. No. 1552, Section 8.1.1.G (details of Megacom promotions will be filed five days before the offer becomes effective). Similar provisions apply to the other AT&T services that are affected by AT&T's promotional tariff.

[11] We recognize that routine or blanket waivers of the Commission's Rules may eviscerate the general rule. We therefore conclude that a reexamination of the Rules to consider whether to reduce the required notice period for promotional filings may be warranted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-112

In re Applications of

JOE L. ALDRIDGE (hereafter "Aldridge") — File No. BPH-871201MA

RUTH H. STEELE (hereafter "Steele") — File No. BPH-871202MB

TOWER COMMUNICATIONS, INC. (hereafter "Tower") — File No. BPH-871203MM

HANCOCK MEDIA, INC. (hereafter "Media") — File No. BPH-871203MQ

For Construction Permit
for a New FM Station on Channel 289A
in Hawesville, Kentucky

HEARING DESIGNATION ORDER

Adopted: May 10, 1989; Released: May 23, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Aldridge and Media have filed such statements, they are deficient. Neither applicant has listed specific local recruitment sources for minorities or women. Accordingly, Aldridge and Media will be required to file amended EEO programs with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Aldridge and Media have not completed Item 4 correctly. Aldridge's application gives a post office box number as the residence address for applicant. Thomas C. Brite, a principal in Media, lists a post office box as his address. Accordingly, Aldridge and Media must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. Applicants below has petitioned for leave to amend its application on the dates shown below. The accompanying amendments were filed after March 11, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES FILED
Steele	11/3/88
Tower	6/2/88, 9/12/88, 10/31/88

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Aldridge and Media shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That Aldridge and Media shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Steele and Tower ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] By letter dated November 17, 1988, Hancock Communications, Inc. (BPH-871203NN) requested that its application be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-111

In re Applications of

YOLO COUNTY PUBLIC RADIO
(hereafter "Yolo")
West Sacramento, California
Channel 205B1
File No. BPED-851217MG

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT
(hereafter "SCUSD")
Sacramento, California
Channel 209
File No. BPED-860226MC

CALIFORNIA STATE UNIVERSITY, SACRAMENTO
(hereafter "Cal State")
Sacramento, California
Channel 205B
File No. BPED-860613MA

FAMILY STATIONS, INC.
(hereafter "Family I")
Ione, California
Channel 202A
File No. BPED-861023MB

FAMILY STATIONS, INC.
(hereafter "Family II")
North Highlands, California
Channel 207A
File No. BPED-861023MF

SACRAMENTO COMMUNITY RADIO, INC.
(hereafter "Community")
Sacramento, California
File No. BPED-870317MD (PREVIOUSLY DISMISSED)

For Construction Permit for
a New Non - commercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: May 10, 1989; Released: May 23, 1989

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications for a new non-commercial educational FM station.

2. *Preliminary matters.* On March 17, 1987, Community tendered an application to provide non-commercial educational FM service to Sacramento, California on Channel 205. That application was returned as unacceptable for filing by staff letter on December 29, 1987 (reference 8920-BE). On January 28, 1988, Community filed a timely petition for reconsideration ("petition") of the return of the application and requested reinstatement thereof. A brief chronology of the circumstances surrounding the return of Community's application is necessary. On December 17, 1985, Yolo filed an application to serve Channel 205 in West Sacramento, California. Thereafter, on February 26, 1986, SCUSD filed an application to serve Sacramento, California on Channel 209. SCUSD was placed on an "A" cut-off list in *Public Notice*, Report No. A-119, released September 22, 1986, which established October 23, 1986 as the cut-off date for the filing of mutually exclusive applications. Family I filed an application on October 23, 1986 which was mutually exclusive with SCUSD's application. Then, on February 13, 1987, Yolo's application was inadvertently placed on an "A" cut-off list, which established March 17, 1987, as the last date for filing competing applications against Yolo. Yolo's application was deleted from the "A" cut-off list on March 12, 1987. Nevertheless, Community filed an application on March 17, 1987 which was mutually exclusive with the Yolo application. Preliminary engineering review revealed that Community's application was mutually exclusive with Family I's application for use of Channel 207. Moreover, Family I's timely filed application linked Community's application by way of a "daisy-chain" interference overlap to the SCUSD application. Therefore, Community's application should have been filed by the close of business on the cut-off date established for filing applications in conflict with SCUSD's application. The public notice establishing the "A" cut-off date stated that "any application seeking to be considered with any application appearing on the attached list, or with any other application on file by the close of business on the cut-off date which involves a conflict necessitating a hearing with any application on this list, must be substantially complete and tendered for filing at the Office of the Commission in Washington, D.C., not later than the close of business on the cut-off date." Because Community's application was not filed by the cut-off date of October 23, 1986, it was returned by the staff as unacceptable for filing by letter dated December 31, 1987. The staff's letter noted that Yolo's application was also linked to the SCUSD application in a "daisy-chain" through the Family I application. Therefore, Yolo was also governed by the October 23, 1986 "A" cut-off date, and Yolo had been erroneously placed on a separate "A" cut off list on February 13, 1987. The error was corrected by an erratum, Report No. A-122A, released March 12, 1987.

3. In its petition, Community argues that it was impossible to recognize that the filing of Family I's application would link it in a "daisy-chain" to SCUSD's application; therefore, the staff unfairly applied the October 23, 1986 cut-off date to its application. Further, Community argues that the staff erred by failing to place Yolo's application on an "A" cut-off list first, because that application was the first filed application in the group. Community asserts that had Yolo's application been placed on an "A" cut-off list first, it would have timely filed a competing application.

4. Community's arguments are without merit. The staff's action returning Community's application as untimely filed is consistent with the policy stated in *Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *appeal dismissed sub nom. Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968). That policy, known as the *Kittyhawk* doctrine, holds that an application will be considered timely for purposes of the cut-off rule only when it is timely filed with respect to the lead application of a group of conflicting applications. The Commission's cut-off procedure is used in the context of non-commercial educational FM broadcast service where channels are not allocated to specific communities and licensing is done on a non-interference basis. The procedure balances the rights of applicants and potential applicants while taking into account the public interest in the expeditious provision of new service by allowing applications to be processed to a conclusion without interruption and without the necessity of reprocessing when new applications are filed or pending applications are amended. *See The Florida Institute of Technology, Inc.*, 4 FCC Rcd 1549 (1989); *Bill R. Wright*, 102 FCC 2d 1142 (1985). The Commission has stated that "prospective applicants have long been on notice that under our cut-off procedures they could be barred from filing applications due to the tendering of unlisted applications which directly or indirectly interlink with listed cut-off applications." *Wright*, 102 FCC 2d at 1146. Applicants who ignore or fail to understand the cut-off procedures assume the risk that they will be prevented from filing competing applications. *Id.* at 1147. Consequently, notwithstanding the inadvertent and erroneous placement of Yolo on an "A" cut-off list, Community's failure to timely file its application for service to Sacramento on Channel 205 by the "A" cut-off date determined by SCUSD's application cannot be excused or waived. *See, e.g., The Florida Institute of Technology, Inc., supra.* Accordingly, Community's petition for reconsideration will be denied.

5. *Other Matters.* Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. We have no indication that Yolo published the required notice. To remedy this deficiency, Yolo must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Administrative Law Judge.

6. SCUSD has submitted financial information in Section III, Form 340. The data contained in that section of SCUSD's application is based in part on an anticipated grant from the Educational Initiatives Fund and the 1984-1985 Sacramento High School Budget. SCUSD has not updated its application to provide current information concerning anticipated costs of construction and operation or current sources of financing for its proposal. Consequently, we are unable to determine SCUSD's financial qualifications. Accordingly, an appropriate financial issue will be specified below.

7. None of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *See Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

8. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals and since this proceeding involves competing applicants for non-commercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

9. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will be specified.

10. Except as indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding, on the issues specified below.

11. Accordingly, IT IS ORDERED, That pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine with respect to SCUSD, whether the applicant is financially qualified.

2. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. § 307(b), which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 C.F.R. § 307(b), the extent to which each of the proposed operations will be integrated into the overall educational and cultural objectives of the respective ap-

plicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That Community's petition for reconsideration IS DENIED and its application IS DISMISSED.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published: Yolo.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed therein, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-115

In re Applications

BLUEFIELD EDUCATIONAL BROADCASTING FOUNDATION
(hereafter BEBF)
Bluefield, Virginia
Req: 91.1 MHz, Channel 216B1
1.0 kW (H&V), 355 meters
File No. BPED-860428MG

VIRGINIA - WEST VIRGINIA COMMUNITY RADIO, INC.
(hereafter VA-WV)
Bluefield, West Virginia
Req: 90.9 MHz, Channel 215B1
0.74 kW (H&V), 336 meters
File No. BPED-860509ME

APPALACHIAN EDUCATIONAL COMMUNICATION CORP.
(hereafter Appalachian)
Bluefield, West Virginia
Req: 91.9 MHz, Channel 216B1
2.0 kW (H&V), 360 meters
File No. BPED-860728MJ

GOLDEN RULE ORGANIZATION WORKSHOP, INC.
(hereafter Golden Rule)
Galax, Virginia
Req: 91.9 MHz, Channel 216A
1.0 kW (H&V), 151 meters
File No. BPED-861229MB

For a Construction Permit
For a Non - commercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: May 10, 1989; Released: May 23, 1989

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.[1]

2. *Preliminary Matters.* None of the applicants have indicated an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.* 43 Fed. Reg. 49560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement.

3. *BEBF.* Section 73.503(a) of the Commission's Rules mandates that an educational broadcast license may only be issued to a nonprofit educational organization and only upon a showing that the facilities will be used for the advancement of an educational program. BEBF states that it is "closely associated with a school", but does not name the school. BEBF states further that it intends to broadcast programming which will "compliment the educational process within the private schools." We find the submitted material insufficient to make a determination that BEBF is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503. Accordingly, an appropriate issue will be specified.

4. Section III of the FCC Form 340 is the Financial Qualifications section. BEBF failed to fill out this section. BEBF, therefore, cannot be found financially qualified. Accordingly, BEBF will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

5. BEBF is proposing to construct a new tower on which it will side-mount its antenna. Stations WVVA-TV and WHAJ(FM) are jointly using a tower that is located 80 meters from this proposed operation. Our study indicates that the combined operation of the existing stations and the proposed station may significantly exceed the radio frequency guidelines under 47 C.F.R. § 1.1307(b). Since the proposal of the applicant may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Accordingly, the applicant will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting,* 71 FCC 2d 229 (1979), *recon.* denied *sub nom. Old Pueblos Broadcasting Corp.,* 83 FCC 2d 337 (1980).

6. *Golden Rule.* Golden Rule has proposed to mount its antenna on the existing tower which is currently authorized by the Commission for translator station KPA 457. Golden Rule lists the overall tower height above ground level as 100 feet. Commission records, however, show the tower height above ground to be 150 feet.

Therefore, a discrepancy exists as to the site elevation. Golden Rule will therefore be required to verify the site elevation and amend accordingly, within 30 days of the release of this Order with the presiding Administrative Law Judge.

7. Galax, Virginia, the community which Golden Rule proposes to serve, lies within the Grade B contour of WVVA-TV, Channel 6, in Bluefield, West Virginia. The applicant claims that because of the terrain in the area, fewer than 3,000 people would receive interference from the proposed FM station. The NTIA/ITS "COVERAGE" computer program which was utilized to reach this conclusion is based on radials every 15 degrees. In this case, only the 165 degree radial from WVVA passes within 5 kilometers of the proposed FM site in Galax. For this reason, the data submitted is not adequate to fully support the applicant's claim. Also, the scale and detail of the map submitted with the engineering study is not adequate for the purpose of establishing precisely where field strength and interference contours will fall. Furthermore, the population distribution within and around Galax is not shown. In addition, the COVERAGE computer program relied on has been found to have large standard errors of estimate. Its predictions are often in error when used, as here, to predict median signal levels for small areas. The problem is compounded in areas of irregular terrain when the 30-second terrain data base is used as opposed to more detailed terrain information such as is found on a 7.5 minute map. Accordingly, the Commission cannot reliably determine the precise location of the potential interference contour and the number of households affected. Therefore, Golden Rule will be required to amend its application within 30 days of the release of this Order with the presiding Administrative Law Judge with more precise engineering data showing where the actual field strength and interference contours will fall and the population affected by the interference.

8. *Other Matters*. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the "B" cut-off date, the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENTS FILED
BEBF	February 11, 1987
Golden Rule	August 14, 1987

9. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

10. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether BEBF is a qualified educational organization as required by 47 C.F.R. 73.503(a).

2. If a final environmental impact statement is issued with respect to BEBF in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, BEBF shall submit with the presiding Administrative Law Judge the financial certification required by Section III, FCC Form 340, or advise the Judge that the required certification cannot be made.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order BEBF shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That Golden Rule verify its tower height and submit an amendment, if appropriate, to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That Golden Rule file an amendment with the relevant engineering data requested in paragraph 7.

17. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by BEBF and Golden Rule ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communication Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594 of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] By letter dated July 17, 1987, the counsel representing both VA-WV and Golden Rule presented the Commission with the following hypothetical: if applicants BEBF and VA-WV were to merge and applicant Appalachian were to dismiss its application, could the merged application and the application of Golden Rule be granted? The letter, however, contains a factual error. The letter assumes that BEBF is not mutually exclusive with Golden Rule. Our studies show that the two applications are mutually exclusive. Furthermore, the letter does not indicate with which of the two proposals the merged applicant would proceed. Without this information, the Commission cannot specifically answer the inquiry in the July 17, 1987 letter, since the Commission would not allow the merged parties to proceed with BEBF's proposal (see paragraph three, *infra*). The letter contains no details of the proposed merger, and by and large, is too speculative for the Commission to respond. Having no details before us, we cannot ascertain whether or not a merger would constitute a major change, an unallowable transaction after the "B Cut-Off" date. Finally, the letter is from counsel representing only two of the applicants involved: the other two applicants have been silent to date. Therefore, the letter cannot constitute a bona fide settlement agreement. Finding that the substance of the letter does not contain sufficient information to permit a response or to constitute a settlement agreement, the applicants will herein be designated for hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK CITY TRANSIT AUTHORITY
Application for Review

File No. L-2328

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1989; **Released: May 23, 1989**

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. By *Memorandum Opinion and Order*, 3 FCC Rcd 5621 (Pri. Rad. Bur. 1988), the Private Radio Bureau (Bureau) granted the New York City Transit Authority (Transit Authority) reconsideration of the cancellation of its licenses for 20 trunked channels in the Land Transportation Radio Service and reinstatement of these licenses. The channels were licensed for use in a city-wide bus radio system that would provide operational and emergency communications.

2. Comtran Associates, Inc. (Comtran), licensee of a 20 channel 800 MHz trunked Specialized Mobile Radio (SMR) station in the New York City area, seeks review of the Bureau's action. Comtran asserts that it is at the top of the waiting list for reclaimed trunked SMR channels in the New York City area, but is unlikely to receive any channels through the waiting list procedure. There are, it claims, no unloaded SMR systems in New York City, and the licenses of those who could not construct and load were long ago cancelled. Comtran argues that its only source of additional channels under these circumstances is through the intercategory sharing procedure by which vacant channels in other pools are assigned to fully loaded SMR operations. Comtran notes that its system is fully loaded, and it could have sought the Transit Authority's channels had they become available. As a potential competitor for these frequencies, Comtran claims standing to seek review.[1]

II. BACKGROUND

3. The Transit Authority's licenses were issued in February 1983, under call signs KNEH 690, KNEH 691 and KB 23096. Pursuant to the provisions of Section 90.629 of our Rules, 47 C.F.R. § 90.629,[2] the Bureau afforded the Transit Authority three years in which to place its system into operation. The fact that the Transit Authority did not meet this deadline is undisputed. By letter of July 2, 1987, the Private Radio Bureau notified the Transit Authority of its failure to meet this condition of its authorization and informed the Transit Authority that its licenses had cancelled in accordance with the provisions of Section 90.629(b).[3]

4. In granting reconsideration and reinstatement the Bureau found that the proposed system was unique, involving the safety of millions of passengers on thousands of buses,[4] and that it was totally dependent upon retention of the 20 channels at issue.[5] The Bureau concluded that the safe and efficient operation of the urban mass transportation system for the largest city in the United States would be seriously harmed by cancellation of the licenses.[6] While acknowledging procedural and other deficiencies on the Transit Authority's part, the Bureau concluded that significant public interest considerations favored construction of the proposed bus radio system.

III. THE PLEADINGS

5. The Transit Authority's petition for reconsideration and reinstatement consisted of a brief pleading filed within the 30 day period specified by Section 1.106(f) of our Rules, 47 C.F.R. § 1.106(f), and a 30 page supplemental pleading, with lengthy exhibits, filed on November 17, 1987. Comtran attacks this latter pleading as unauthorized and untimely, and argues that acceptance of the pleading violated the provisions of Section 1.106(f) to its prejudice. This is so, Comtran asserts, because the first pleading was too brief and perfunctory to support the Transit Authority's position and only the second contained facts and arguments sufficient to make a case for relief.[7] Comtran cites in support of its argument *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987); *Westinghouse Broadcasting Co., Inc.*, 46 RR2d 1431 (1980) and *Dena Pictures*, 46 RR2d 1583 (1980).

6. With respect to the merits of the Bureau's decision, Comtran urges that the Bureau ignored a significant factor in reaching its conclusion; namely, the "picture of bureaucratic incompetence" revealed by the record.[8] Comtran asserts that an "inability to meet any kind of a regulatory deadline permeates the entire Transit Authority and City bureaucracy."[9] Furthermore, Comtran contends that the Bureau erred in relying upon an implementation schedule submitted by the Transit Authority with its November 1987 pleading. Given that the Transit Authority could not actually pursue construction until after the Bureau disposed of its petition, Comtran contends that the implementation schedule, which called for steps to be taken as early as November 1987, was "stale when submitted and a sham."[10]

7. The Transit Authority challenges Comtran's standing to seek review of the Bureau's decision stating that potential applicants do not have standing to file petitions to deny. *Family Television Corp.*, 59 RR2d 1344 (1986), and *McClatchy Newspapers*, 46 RR2d 43 (1979).[11] Nor, it adds, does lack of public notice justify Comtran's failure to participate in this matter at an earlier stage. The Transit Authority cites *Allnet Communications Services, Inc.*, 62 RR2d 117 (1987), as support for this latter proposition.[12]

8. Turning to the Bureau's acceptance of its November 1987 supplemental pleading, the Transit Authority states that Section 1.106(f) expressly permits grants of leave to file pleadings after expiration of the 30 day period where such leave is sought by separate pleading stating grounds therefor. The Transit Authority notes that it filed a separate pleading with its supplement and, thus, maintains that it complied fully with the Rules.[13] The Transit Authority claims further that the cases cited by Comtran do not support Comtran's argument. *Meredith Corporation, v. FCC, supra* at 869, acknowledged and affirmed Commis-

sion discretion to accept pleadings after the 30 day reconsideration period. *Westinghouse Broadcasting, supra* at 1432, concerned a failure to file the petition for reconsideration itself and *Dena Pictures, supra* at 1585, involved an applicant who failed to submit the requisite separate pleading justifying its request for leave to file an otherwise unauthorized document.

9. As for the merits of the Bureau's decision, the Transit Authority urges that reinstatement of its licenses is consistent with Commission policy and precedent favoring promotion of public safety. The Transit Authority asserts that the record amply supports a finding that it encountered unforeseen delays caused by circumstances beyond its control, particularly when difficulties associated with the project's size, scope and budget are taken into account.[14] Further, the fact that implementation was delayed awaiting action on its petition does not constitute grounds for reversal. The Transit Authority states that it established its implementation schedule in good faith on the premise of a prompt grant of reconsideration. It modified its schedule where necessary while the petition was pending, but at all times it advised the Commission of these changes.[15] The Transit Authority argues, moreover, that the record establishes that it has made substantial efforts and progress toward implementing its important bus radio system.[16]

IV. DISCUSSION

10. Turning first to the procedural issues, we need not decide whether Comtran has standing to seek review of the Bureau's decision. Assuming, *arguendo*, that Comtran has standing, its application for review fails on the merits, and we affirm the Bureau's action.[17]

11. The Bureau acted correctly in considering the Transit Authority's supplemental pleading. First, the Transit Authority filed for reconsideration within the required 30-day period. Second, Section 1.106(f) requires that leave to file after the 30-day reconsideration period be sought by separate pleading stating grounds therefor. The Transit Authority filed a separate pleading seeking permission to supply "critical information" that it "erroneously believed the Commission had been apprised of well before rendering its July 2 order." We note that the supplemental pleading was submitted before formal Bureau evaluation commenced, and that the pleading provided information essential to an understanding of the public interest considerations raised. We conclude that leave to file the supplemental pleading was properly sought and properly granted under these circumstances.[18]

12. Comtran's assertion that the Bureau ignored evidence of incompetence is simply incorrect. Rather than overlooking evidence of bureaucratic delay, the Bureau specifically noted its existence but concluded that public interest considerations outweighed administrative shortcomings. The Bureau was explicit on this point:

> [T]he proposed system is a unique one, involving the safety of millions of passengers on thousands of buses, and it is totally dependent upon retention of the 20 channels at issue. The safe and efficient operation of the urban mass transportation system for the largest city in the United States would be seriously compromised by cancellation of these licenses. Under these circumstances, procedural deficiencies due to overlapping responsibilities of local government bodies do not outweigh the significant public interest considerations favoring construction of the bus radio system proposed here.[19]

We agree fully with this assessment.

13. Turning finally to the proposed implementation schedule, it is inevitable that schedules submitted with an initial petition may become obsolete by the time of final action. We cannot expect applicants to assume major financial or other burdens in pursuit of a system whose approval is still in doubt. What we do expect of applicants is a schedule that demonstrates their understanding of the tasks involved, their ability to approach these tasks in a realistic and expeditious manner and their commitment to a timetable consistent with our rules. The Bureau concluded, and we agree, that the implementation schedule submitted by the Transit Authority met all of these requirements. That it did not take specifically into account time necessary for our reconsideration and review processes is not valid grounds for its rejection.

14. In summary, we conclude that the Bureau's decision reinstating the Transit Authority's license for its city-wide bus radio system was in the public interest. Therefore, we affirm the Bureau's action.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that the Application for Review filed by Comtran Associates, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Application for review at 3-6. In addition, Comtran excuses its lack of participation at an earlier stage of this proceeding on grounds of lack of notice.

[2] Section 90.629 provides, *inter alia*, an extended implementation schedule of up to three years for local governmental agencies required by law to follow a multi-year cycle for planning, approval, funding, and purchasing a proposed system. Applicants under this provision must submit an implementation schedule for the construction and loading of the facility and file annual progress reports. Authorizations under this section are expressly conditioned upon the licensee's compliance with its implementation schedule.

[3] Under Section 90.629(b), if a licensee fails to meet its implementation schedule and all channels in its geographic area are assigned, authority for trunked channels not loaded to 100 mobile stations cancels. Reinstatement of the Transit Authority's licenses required waiver of this provision.

[4] The Transit Authority stated in its petition that its 4,000 buses carry approximately 500 million passengers annually on 203 local and 24 express routes.

[5] According to the Transit Authority petition, the bus system's current radio system is so antiquated and inadequate that bus drivers must use public telephones to seek assistance, and dispachers must resort to use of automobiles to track down buses.

[6] With regard to the question of public safety, the Transit Authority stated in its petition that 380 assaults and robberies were committed against bus operators during 1986.

[7] Application for review at 8-10, 12-14.

[8] *Id.* at 16.

[9] *Id.* at 18.

[10] *Id.* at 19-21.

[11] Opposition to application for review at 2-4.

[12] We note that neither the initial notice of cancellation nor the filing of the petition for reconsideration were subject to the public notice requirements of Section 309(b) of the Communications Act of 1934, as amended, and no formal Public Notice of these events was provided.

[13] Opposition to application for review at 5-6.

[14] *Id.* at 13-16.

[15] *Id.* at 16.

[16] As evidence of its progress, the Transit Authority submitted with its opposition to application for review the affidavit of Robin C. Stevens, Deputy Vice President, Contracts Department, Material Division, New York City Transit Authority, dated October 19, 1988, documenting steps taken to construct the radio system after the Transit Authority's November 1987 pleading. We will accept the submission as an interim progress report under Section 90.629(b), and will include it in the Transit Authority's records on this basis.

[17] We note, however, that the Transit Authority's channels are in the Industrial Radio Service. If recovered, they would have been available to a broader group of applicants than those on the waiting list for 800 MHz SMR channels in the New York City area. These channels would have been available to eligibles in the Industrial Radio Service, as well as to eligibles in other Part 90 service categories through intercategory sharing. Thus, the fact that Comtran was on top of the waiting list for reclaimed trunked SMR channels in the New York City area gave it no inherent right to receive these channels had they been reclaimed and made available. In this regard, channels do not become generally available until Commission recovery actions are final, including disposition of any motions for reconsideration.

[18] We agree with the Transit Authority that cases cited by Comtran do not hold otherwise. *See* para. 8, *supra*. With respect to *Dena Pictures*, we add that despite the dismissal of the supplemental pleading in that decision, because the facts contained therein were relevant to the public interest, the Commission considered the material in the supplement anyway. Thus, even if the Transit Authority had not properly requested acceptance of its supplemental pleading, the public interest would similarly have warranted consideration of the facts raised in the Transit Authority's supplement. *See* para. 12, *infra*.

[19] Memorandum Opinion and Order, 3 FCC Rcd at 5622. (Footnote omitted).

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Application for the review of an action by the Private Radio Bureau granting the New York Transit Authority reconsideration of the cancellation of its license for 20 trunked channels in the Land Transportation Radio Service and the reinstatement of its licenses.

I concur in upholding the Private Radio Bureau's reinstatement of New York Transit Authority's license to operate 20 trunked channels in the Land Transportation Radio Service. I do so on the basis of the overall public interest benefit of the Transit Authority's proposed use of these channels.

For the record, it is important to recognize that under normal circumstances the Transit Authority's license to operate the 20 trunked channels in the Land Transportation Radio Service should be cancelled. They failed to meet our slow growth system reporting requirements. Equally important to recognize is the fact that the Commission is not without fault in this matter. It failed to enforce its slow growth system reporting requirements. In this case and as a result of our failure to enforce slow growth systems requirements, 20 trunked channels in New York City remained fallow for the past few years. I am pleased to note the Bureau has begun to enforce slow growth system reporting requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC BELL AND NEVADA BELL

Plan for the Provision of
Comparably Efficient Interconnection
for Voice Store and Forward Service

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 1989; Released: May 22, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 18, 1988, pursuant to the requirements of the *Computer III* proceeding,[1] Pacific Bell and Nevada Bell (Pactel) filed a Comparably Efficient Interconnection (CEI) plan (Plan) to offer Voice Store and Forward (VSF) Service. The *Phase I Order* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an integrated basis prior to its implementation of Open Network Architecture (ONA) to submit a service-specific CEI plan. In addition to satisfying CEI requirements, such a plan must meet other requirements pertaining to additional nonstructural safeguards governing the use of customer proprietary network information (CPNI), the disclosure of network information, and nondiscrimination reporting.[2] In this order, we approve the Plan, as described below.[3]

II. SERVICE DESCRIPTION

A. *The Plan*

2. Pactel states that its VSF service will allow enhanced service providers (ESPs) and end users to store and forward either voice or data messages electronically. Pactel will offer VSF through its voice storage system (VSS) equipment. The two primary uses of VSF are "information retrieval" and "information deposit." According to Pacific, both can be operated with tariffed network services to increase the efficiency of end users' telecommunications systems.[4]

3. The "information retrieval" function allows end users to interact with an "audiotex program" or "ESP software program"[5] to obtain information of either specific or general appeal.[6] The audiotex program will be stored on Pactel's VSS, and will enable the VSS to retrieve the information from the ESP's database.[7]

4. The "information deposit" function allows end users to interact with an audiotex program stored in the VSS to deposit information of their own creation with the ESP. If the deposited information is not stored on Pactel's VSS, Pactel will deliver the information to the ESP. Users may direct the ESP, through VSF, to take specific action on the information deposited.[8] Pactel states that its VSS will not manipulate the information deposited by the end user, but will merely store the deposited information for retrieval or forwarding to the ESP.[9]

5. According to the Plan, ESPs will enjoy great flexibility in structuring the information retrieval and deposit functions. An ESP will have the option to employ application software previously developed by Pactel, or to have Pactel develop new or modify existing Pactel application software to create a customized program.[10] In all cases, the ESP will determine the content of the information presented to the end user and the software programs the ESP will use.[11]

6. As Pactel's customers for VSF service, ESPs will be charged a fee for the VSF services they use. Each ESP will choose among network access arrangements in order to connect its service to the network. This choice of arrangements may affect the charges that end users pay to call the ESP's service.[12] When an end user charge is applicable for an access arrangement (*e.g.*, a message unit charge), Pactel will bill the end user at the tariffed rate. If an ESP elects to have Pactel arrange its access services instead of purchasing the basic services under tariff, Pactel plans to assess a nontariffed service charge or "commission" for such an arrangement.[13] Pactel adds that it will not provide or arrange interLATA telecommunications service, and will require ESPs to make such arrangements, if necessary, through the interexchange carriers of their choice.[14]

B. *Discussion*

7. We generally approve Pactel's VSF service description. However, Pactel states that it plans to assess a nontariffed service charge or "commission" on ESPs that elect to have Pactel arrange their access services. Pactel does not explain the nontariffed activities it will perform that justify such a charge. Indeed, it appears from the Plan that this nontariffed charge is related to an activity -- the arrangement of basic access service -- that Pactel already provides as part of its regulated activities. In addition, Pactel does not indicate whether it would apply this charge only to certain ESPs or whether it would uniformly apply this charge to all customers choosing to have Pactel provide their access service arrangements. The Commission's CEI rules prohibit BOCs from discriminating in providing the basic services, including access services, that underlie their integrated enhanced service operations. Given the limited amount of information about this charge in the Plan we cannot determine that the Plan describes an enhanced service charge or that this charge will be applied in a non-discriminatory fashion. Accordingly, we do not permit Pactel to impose the service charge on ESPs who request that Pactel arrange access to the basic services required for Pactel's VSF service.[15]

III. COMPLIANCE ISSUES

A. *CEI Arrangements and Requirements*

8. Pactel lists the currently tariffed services that it intends to offer to those ESPs that subscribe to Pactel's VSF service, including: Local Exchange Service, Premium Exchange Service, Private Line Service, Automated Call Distribution, Direct Inward Dial to PBX systems, ESS Automatic Call Distributing, Individual Measured Business Line, Centrex, 800 Service, Foreign Exchange Ser-

vice, DDS, Public Packet Switching, and High Capacity Systems.[16] The Plan further states that VSF will use the BSEs contained in Pactel's state ONA tariff approved by the California Public Utilities Commission (CPUC) on November 9, 1988: forwarded call information-multiple use, activate message waiting indicator, call forward busy line, call forward on don't answer, call forward on busy line/don't answer, and message waiting indicator.[17] In addition, Pactel has filed a proposed tariff for "information calling services" (ICS), which may be used in VSF to provide intraLATA billing and transport services for ESPs within Pactel's franchise area.[18] The Plan states that upon approval of the ICS tariff by the CPUC, Pacific Bell will submit a sample of that tariff to the Commission. VSF competitors will be able to offer VSF through these or other Pacific Bell tariffed services.[19]

9. The *Phase I Order* lists nine CEI parameters: interface functionality; unbundling of basic services; resale; technical characteristics; installation, maintenance and repair; end user access; minimization of transmission costs; CEI availability; and recipients of CEI No parties commented on Pactel's treatment of any of these parameters. Based on our examination of the Plan, we approve Pactel's treatment of these parameters, and of the other nonstructural safeguards discussed in the Plan.[20] We require Pactel to submit relevant sample pages of the ICS tariff to the Common Carrier Bureau within 10 days of its approval by the CPUC.

B. ***Billing***

10. The Plan proposes a variety of billing services.[21] Pactel will offer to ESPs that subscribe to VSF an option to bill or credit end users for communication charges on the Pactel bill.[22] Pactel adds that it will determine the mechanics of such billing in negotiations with each individual ESP. Pactel's regulated operations will bill end users for their normal network charges incurred in reaching the VSF service.[23] In addition, Pactel states that while it currently intends to use its in-house billing systems to support its own VSF offering, it may later elect to use an outside billing agency for its billing services, if it finds such a course to be more cost-effective.[24]

11. Pactel states that it is examining the provision of billing services for competing VSF providers. It states that if competing VSF service providers, or other ESPs request additional third party billing services, Pactel would be interested in evaluating whether to offer these billing services to such providers. Pactel states that it would first need to determine if sufficient demand existed for such services. Pactel also notes that it presently provides "976" billing and transport services to certain ESPs and expects to continue to make this and similar services available to ESPs that do not use Pactel's VSS service.[25]

1. ***Positions of the Parties***

12. ANPA argues that Pactel apparently does not plan to make a nondiscriminatory billing service generally available to competing VSF service providers, unless tied to ICS access,[26] and claims this "tying of billing" for competing VSF services to use of ICS access arrangements raises serious discrimination concerns. ANPA argues that to promote the widespread development of enhanced services, we should preclude such discrimination in billing that, it claims, might cause "domination" of the electronic messaging market by a single BOC.[27]

13. Pactel replies that the Commission's rulings do not require it to offer billing services, since there is sufficient competition for such services to allow market forces to respond to discriminatory practices.[28] Pactel adds that the Commission has approved earlier CEI plans without requiring BOC provision of billing service, and that ANPA has provided no reason why this Plan should not receive similar treatment.[29] Further, Pactel states that it plans to offer certain billing data as basic services so that third party ESPs have the necessary information to prepare their bills or to have a third party billing vendor prepare it for them.[30] Pactel notes that, pursuant to the *BOC ONA Order*, it will file with the Commission on May 19, 1989, a complete description of the type of billing information that it plans to provide.

2. ***Discussion***

14. As we stated in previous CEI orders,[31] the *BOC ONA Order* addressed the issue of BOC provision of billing and collection services for ESPs and decided not to mandate that the BOCs offer these services on a regulated basis or otherwise subject to the ONA requirements.[32]

15. However, the *BOC ONA Order*, among other things, requires Pactel, along with the other BOCs, to explain in detail by May 19, 1989, its plans to offer information that ESPs need to prepare their own bills and requests the Information Industry Liaison Committee, an interindustry group that is addressing ONA issues, to consider means of providing such information.[33] ANPA does not convince us that special circumstances exist that warrant a ruling that differs from those of previous CEI orders or that of the Commission in the *BOC ONA Order*. Therefore, we do not require Pactel to provide billing services to VSF competitors. Pending Commission evaluation of Pactel's May 19, 1989 filing, we approve Pactel's proposed treatment of billing.

IV. ORDERING CLAUSES

16. IT IS ORDERED that, pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, and 218, 5 U.S.C. § 553, and Sections 0.91(h) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h), 0.291, the Plan for the Provision of Comparably Efficient Interconnection for Voice Store and Forward Service IS APPROVED, to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX

PARTY FILING CEI PLAN

Pacific Bell and Nevada Bell (Pactel)

PARTIES FILING COMMENTS

American Newspaper Publishers Association (ANPA)

PARTY FILING REPLY

Pactel

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. Fcc*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration pending, appeals pending sub nom. BellSouth Corp. v. FCC*, No. 87-7290 (9th Cir.) (pet. for rev. filed April 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.)(pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also* Filing and Review of ONA Plans, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (*BOC ONA Order*).

[2] *Phase I Order*, 104 FCC 2d at 1020. A BOC also must satisfy the cost allocation requirements of our *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), modified on recon., 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration*), *petitions for further reconsideration pending*.

[3] A list of commenters appears in Appendix A. We use the abbreviations in that Appendix throughout this order. We do not discuss arguments raised in the comments that have been raised numerous times in other CEI proceedings and that we have already resolved.

[4] Plan at 6-7. Pactel notes that the Commission approved its CEI plan for "voice mail" on May 23, 1988. *See* Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Services, *Memorandum Opinion and Order*, 3 FCC Rcd 1095 *(Pactel VMS Order), further order*, 3 FCC Rcd 3552 *(May 23 Order)* (1988). The Plan states that voice mail is one example of a voice store and forward service. According to Pactel, since voice mail is a "relatively narrow application" of voice storage and forwarding, it is appropriate for Pactel to file a new CEI plan rather than amend its voice mail plan. Plan at 3.

[5] According to Pactel, the terms "audiotex program" and "ESP software program" are synonymous. These programs guide the end user through the service *(e.g.*, through audible navigational prompts and responses) and are owned and/or controlled by the ESP. *See* Ex Parte Letter from Joseph M. Cancilla, Director, Federal Regulatory Relations, Pacific Telesis, to Donna R. Searcy, Secretary, FCC (filed May 3, 1989) *(May 3 Pactel Ex Parte Letter)*.

[6] This information may be stored in an ESP's own database, not collocated with Pactel facilities. Alternatively, Pactel could store the ESP's information in the VSS if the ESP desires.

[7] Plan at 7-8.

[8] Users would normally enter such directions through a touchtone pad, but voice commands by users are also possible.

[9] Plan at 8-9.

[10] Pactel defines "application software" as the computer software that provides the audiotex program. *See* Ex Parte Letter from Joseph M. Cancilla, Director, Federal Regulatory Relations, Pacific Telesis, to Donna R. Searcy, Secretary, FCC (filed April 27, 1989) *(April 27 Pactel Ex Parte Letter)*. Pactel further describes "application software" as the underlying computer language program that allows the system hardware to respond to the end user responses and ESP programs. The application software is owned and/or controlled by Pactel. *See May 3 Pactel Ex Parte Letter*. ESPs will not have the option to design their own application software, but can have Pactel design the content and context of the "audiotex program" or "ESP software program." *See* Ex Parte Letter from Joseph M. Cancilla, Director, Federal Regulatory Relations, Pacific Telesis, to Donna R. Searcy, Secretary, FCC (filed May 12, 1989) *(May 12 Pactel Ex Parte Letter)*.

[11] Plan at 11.

[12] Pactel states that, for example, if the ESP elects to use "800" service there would be no network transport charges to the end user, whereas "976" service would result in a fixed charge to the end user for each call to the service.

[13] Plan at 12-13. The ESP and Pactel's VSF service entity will negotiate this charge in advance. *April 27 Pactel Ex Parte Letter*.

[14] Plan at 13.

[15] If Pactel desires to impose such a service charge in connection with VSF or another enhanced service, it must file an amendment to the relevant CEI plan that explains the charge more fully, and shows that such a charge is not a telecommunication service and is consistent with the nondiscrimination goals of the CEI rules.

[16] Plan at 21 & Exhibit II. The Plan states that both Pacific Bell and Nevada Bell offer these services except in the following cases: ESS Automatic Call Distributing and Packet Switching are only tariffed by Pacific Bell. The Plan further states that Nevada Bell's high capacity service is tariffed on an individual case basis. Plan at 21 n. 18. Pactel also notes that its Centrex offering has been detariffed, but emphasizes that it will be provided to competing VSF providers under terms and conditions that are no less favorable than those provided to Pactel's VSF operation. Plan at 20 n. 17. In addition, Pactel clarifies that while the Plan implies that Local Exchange Service is not tariffed by Nevada Bell, Pactel's reference to Local Exchange Service was intended to indicate that, instead of including Hunting Service under its Local Exchange Service tariff, Nevada Bell includes it under its Premium Exchange Service tariff. *May 12 Pactel Ex Parte Letter*.

[17] Plan at 21-22.

[18] *See* Exhibit II, § 9.5.3.A.1. The illustrative tariff in Exhibit II adds that the billing and transport services offered by Pactel under ICS are for audiotex, videotex, and live group telephone conversations. *Id.*

[19] Plan at 22. The Plan states that the proposed ICS tariff sheets attached to the Plan in Exhibit II are not the same as those Pacific Bell filed on on April 1, 1988. The attached sheets, according to Pactel, reflect changes stemming from subsequent

workshops held at the CPUC. The attached tariffs sheets are drafts that are subject to further change as a result of continuing proceedings at the CPUC.

[20] *Phase I Order*, 104 FCC 2d at 1039-43, paras. 154-166.

[21] Pactel notes that the costs of billing will be allocated in accordance with the *Joint Cost Order* to ensure that its enhanced service operations appropriately account for services provided to them.

[22] Plan at 39. Pactel adds that the term "communication charges" refers to those types of charges typically associated with 900 or 976 types of access arrangements. *April 27 Pactel Ex Parte Letter*.

[23] Plan at 39-40. Pactel states that to the extent that a competing VSF service purchases access from the ICS tariff, Pactel will bill end users on behalf of the competing VSF service consistent with the terms of the ICS tariff. *Id.* at n. 48. Pactel further states that the normal network charges will appear in the appropriate "regulated services" portion of the customer's bill. Pactel adds that no final decision has been made as to whether any additional, non-regulated charges associated with VSF service will appear either: (1) on a separate line within the bill; (2) on a separate page within the same bill packet; or, (3) in an entirely separate billing packet. *April 27 Pactel Ex Parte Letter*.

[24] Plan at 40.

[25] Plan at 40-41. Pactel notes that the *Phase I Order* only requires the unbundling of "basic network capabilities", which Pactel contends does not include bill preparation, mailing, collection, and remittance.

[26] ANPA Comments at 4.

[27] *Id.* at 5-6.

[28] Reply at 3.

[29] *Id., citing* Pacific Bell and Nevada Bell Plan For The Provision of Voice Mail Services, *Memorandum Opinion and Order*, 3 FCC Rcd 1095 *(Pactel VMS Order), further order*, 3 FCC Rcd 3552 (1988) *(May 23 Order)*.

[30] Plan at 40-41. Pactel states that the language in the *Phase I Order* discussing the unbundling of billing actually refers to "basic network capabilities". Plan at 41 n.49, *citing Phase I Order*, 104 FCC 2d at 1040, para. 158. Pactel asserts that these capabilities represent aspects of billing rather than billing itself. Pactel states that the ability to identify the calling number and duration of a call are examples of basic network capabilities that BOCs may be required to provide. Plan at 41 n. 49.

[31] *See, e.g.*, Pacific Bell and Nevada Bell, Plan for the Provision of Electronic Messaging Services, *Memorandum Opinion and Order*, 4 FCC Rcd 1640 (1989), paras. 15-19.

[32] *BOC ONA Order*, 4 FCC Rcd at 59, para. 109, *citing* Pacific Bell and Nevada Bell Plan for the Provision of Electronic Messaging Service, Pactel Reply at 4-5 (filed Aug. 19, 1988).

[33] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

CELLULAR, INC. MSD 89-9

For waiver of Section 22.922(a)
of the Commission's Rules to
permit a public offering of
convertible subordinated debentures

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1989; Released: May 23, 1989

By the Acting Chief, Mobile Services Division:

1. We have before us for consideration a "Petition for Rule Waiver and Request for Expedited Action" filed March 28, 1989, by Cellular, Inc. In its petition, Cellular, Inc., a publicly-traded corporation, seeks a waiver of Section 22.922 of the Commission's Rules to allow it to proceed with a public offering of convertible subordidnated debentures.[1] The petition explains that Cellular, Inc. has minority (*i.e.*, up to 49 percent) ownership interests in applications pending before the Commission for authority to establish new wireline cellular systems to serve 71 Rural Service Area (RSA) markets. The petition also notes that, to date, the competing wireline cellular applicants in 48 of those 71 markets have achieved full market settlements. Cellular, Inc. states that the net proceeds received from the sale of the debentures will be used, among other things, to finance MSA and RSA cellular projects and for general corporate purposes, including working capital and administrative expenses.

2. Section 22.922 of the Commission's Rules prohibits the alienation of any interest in an RSA application prior to the grant of a construction authorization. This restriction on transfers of interests includes "option arrangements and agreements, as well as equity and debt placement plans." Cellular, Inc. argues that the issuance of debentures does not appear to be subject to the restrictions of Section 22.922 of the Rules; nevertheless, if the Commission should determine that the transaction is subject to the antialienation prohibitions of that rule, a waiver is requested. In addition, Cellular, Inc. asks that the Commission act upon its petition on an expedited basis.

3. Allowing Cellular, Inc. to proceed with a public offering of debentures will not undermine the goals which the Commission wished to achieve when it adopted the provisions of Section 22.922 of the Rules, namely, to minimize speculation in applications and to eliminate any unnecessary delays in the implementation of service to the public. *See Amendment of the Commission's Rules for Rural Cellular Service, Third Report and Order*, 64 R.R.2d (P&F) 1382 (1988). A debenture is a debt security and the holders of the debentures will be general creditors of Cellular, Inc. unless and until they exercise their right to convert the debentures into common stock. Cellular, Inc. notes that even if the debenture holders exercised their conversion rights, they would, in the aggregate, own up to approximately 25 percent of Cellular, Inc.'s common stock and that there is no identified buyer for the debentures. In this light, it is clear that the public offering of debentures by Cellular, Inc. to finance outstanding business needs is not the type of transaction which the Commission intended to prevent when it adopted Section 22.922 of its Rules. Therefore, we hereby waive the provisions of Section 22.922 of the Commission's Rules to permit Cellular, Inc. to proceed with the public offering of its debentures.

4. Accordingly, IT IS ORDERED that Cellular, Inc.'s "Petition for Rule Waiver and Request for Expedited Action" filed March 28, 1989, IS GRANTED and that the provisions of Section 22.922 of the Commission's Rules ARE WAIVED as indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Cellular, Inc. explains that if the Commission grants the requested waiver, Cellular, Inc. will file its Form S-1 Registration Statement for the debentures with the Securities and Exchange Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. I-T-C-89-044

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 15, 1989; Released: May 24, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 10, 1989 by Telefonica Larga Distancia de Puerto Rico (TLD), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone service of existing common carriers to provide international switched voice service between Puerto Rico and various overseas points. The application was placed on public notice on January 25, 1989. The pleadings will be discussed in order of their receipt.

PLEADINGS

2. On February 24, 1989, comments were filed by American Telephone and Telegraph Co. (AT&T). AT&T does not oppose the application, but states that the Commission should make it clear that TLD must comply with the safeguards on participation in "off-island" service imposed by the Commission in prior proceedings including *inter alia*, CC Docket No. 86-309, and the ENF 88-15 proceeding.

3. On February 27, 1989, a Petition to Deny the application was filed by Call U.S. Inc. Call U.S. states that it has standing to object to grant of the application since it is a reseller of communications between Puerto Rico and overseas points and thus a potential competitor of TLD. Further, Call U.S. argues that TLD does not present the economic justification required by the Commission's Rules.

4. In its Opposition to the Petition to Deny, filed on March 9, 1989, TLD states that AT&T supports grant of its application. TLD also argues, as TLD is a non-dominant carrier without market power, that Call U.S. does not have standing to oppose the application since the competition TLD proposes can cause no ecnomic injury. Further, TLD states that it has provided sufficient economic justification, which is no less than that provided by Call U.S. in its resale application which was granted by the Commission. Finally, TLD states that since the Commission has already found that competition in the off-island Puerto Rico market is in the public interest, the addition of another non-dominant carrier cannot be anything but helpful to that competition.

5. On March 16, 1989, Call U.S. filed its Reply to the Opposition. In addition to reiterating the issues of standing and economic justification, Call U.S. raises an additional issue. It states that the PRTC/AT&T and the Puerto Rico Telephone Authority (PRTA) do not oppose the TLD application because they have an independent settlement agreement and that the Commission should not grant the instant application before resolution of its Freedom of Information Act request pending before the Commission (Control No. 88-209).

6. On March 23, 1989, TLD filed a letter stating that the new issue raised in the Call U.S. Reply should not be considered, since the argument is not responsive to matters raised in TLD's Opposition. TLD further argues that this settlement agreement in no way bears on TLD's resale of the services of AT&T, U.S. Sprint and MCI, and its confidentiality is the subject of a different proceeding. Call U.S. answered in a letter filed on March 24, 1989, arguing that an AT&T/PRTA/PRTC settlement agreement, which is the object of the pending FOIA request, could provide necessary insight concerning the basis for a competitor's (AT&T's) support of TLD's application.[1]

DISCUSSION

7. Upon consideration of the application and pleadings, we find that a grant of TLD's application will serve the public interest. The Commission has determined that competition in the domestic and international off-island market is feasible and would promote the public interest.[2] In reaching that conclusion, the Commission clearly contemplated entry by TLD and set forth guidelines governing its entry. Based on this decision, the Commission has granted several TLD applications for service between Puerto Rico and off-island points.[3] Absent any indication that either PRTC or TLD has violated Commission guidelines governing the provision of off-island services, there is no reason why the application should not be granted. No party has pointed to any violation by TLD of the Commission's guidelines for entry into the Puerto Rico off-island market. We also find that the Call U.S. Petition to Deny does not raise issues which warrant the denial of the instant TLD application. With respect to Call U.S.'s assertion that TLD provided insufficient economic justification in its application, we would observe that the Commission has not required extensive economic justification of non-dominant resale carriers, particularly since such carriers do not propose to construct or acquire transmission facilities but, rather, merely seek to resell the services of facilities owning carriers. We further observe that the degree of econmic information provided by TLD is essentially the same as that provided by Call U.S. in its application[4] for authority to become a resale carrier and by many other applicants seeking to become resale carriers. We find that the economic justification submitted by TLD to be sufficient for the type of service it seeks authority to provided.

8. We further find that the Call U.S. assertions pertaining to the settlement agreement between AT&T, the Puerto Rico Telephone Company (PRTC) and the Puerto Rico Telephone Authority (PRTA) to be without merit. Call U.S. asserts that it is necessary to examine the subject agreement to ascertain why AT&T supports TLD's, a competitor, application. It, therefore, requests that we delay our decision in this proceeding until the Commission acts on its Freedom of Information Act (FOIA) request to

examine the settlement agreement. We first would observe that, contrary to the pleadings of both Call U.S. and TLD, the Comments filed by AT&T in this matter do not indicate that AT&T supports TLD's application but merely that "AT&T welcomes competition and, therefore, does not oppose this application." Thus, in effect, Call U.S. is requesting that we delay our decision in this proceeding until it can examine the settlement agreement to determine whether that agreement discloses a reason why AT&T choose not to oppose TLD's application. We would note that AT&T also did not oppose the application of Call U.S., also a competitor. We do not find that AT&T's failure to oppose TLD's application raises public interest concerns sufficient to warrant the requested delay. We further observe that the Commission, by delegated authority has denied the FOIA request of Call U.S.[5] In view of the foregoing, we shall deny the Call U.S. Petition to Deny the subject application. We shall grant AT&T's request that the conditions imposed on the participation of PRTC and TLD in the provision of off-island services in CC Docket No. 86-309 and ENF-88-15 be imposed on this authorization.

9. As the Commission has previously recognized, increased competition in international markets, including specifically the Puerto Rico off-island market, is beneficial.[6] We find that the market will support additional carriers and that the added competition will be in the public interest.[7]

10. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TLD.

11. Accordingly, IT IS ORDERED that application File No. I-T-C-89-044 IS GRANTED, and TLD is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 13 and 14, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 2 between Puerto Rico and those points listed in those tariffs.

12. IT IS FURTHER ORDERED that TLD shall comply with the conditions imposed in the Report and Order in CC Docket No. 86-309, Authorization of Common Carrier Facilities Off Puerto Rico, 2 FCC Rcd. 6600 (1987); Memorandum Opinion and Order, File No. ENF-88-15, Puerto Rico Telephone Authority, 3 FCC Rcd 5675 (1988); and La Telefonica Larga Distancia de Puerto Rico, 3 FCC Rcd. 5937 (1988).

13. IT IS FURTHER ORDERED that copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

14. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

15. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

16. The Petition to Deny filed by Call U.S. is hereby Denied.

17. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] TLD's March 23, 1989 letter and Call U.S.'s March 24, 1989 letter are not pleadings contemplated by the Commission's Rules and Regulations. *See* 47 C.F.R. §1.45 (October 1, 1988). However, since consideration of these letters will not delay this proceeding, we shall consider them.

[2] *See* Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service Off of the Island of Puerto Rico, Notice of Proposed Rule Making, CC Docket No. 86-309, FCC 86-319, Mimeo 36783 (released July 18, 1986); *Report and Order*, 2 FCC Rcd 6600 (1987).

[3] *See* Puerto Rico Telephone Authority, Declaratory Ruling, File No. ENF-88-15, 3 FCC Rcd 5675 (1988); La Telefonica Larga Distancia de Puerto Rico, File No. I-P-C-81-039-A et al, 3 FCC Rcd 5937 (1988).

[4] *See* Order, Authorization and Certificate, 2 FCC Rcd 3331, (1987).

[5] *See* letter to Frederick M Joyce, Esquire, dated May 9, 1989, File No. ENF-89-10.

[6] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[7] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TA INVESTMENT COMPANY, INCORPORATED — File No. I-T-C-89-081

Application for authority to operate as an international resale carrier.

TELEMARKETING CORPORATION OF LOUISIANA — File No. I-T-C-89-082

Application for authority to operate as an international resale carrier.

ALAMO CITY LONG DISTANCE, INCORPORATED — File No. I-T-C-89-083

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 15, 1989; Released: May 24, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 14 and 20, 1989, respectively, by TA Investment Company, Inc. (TA), Tele Marketing Corporation of Louisiana (TMCL) and Alamo City Long Distance, Inc. (ACLD), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on March 28, 1989. No comments were received.

2. The applicants are already providing domestic resale services. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by AT, TMCL and ACLD.

4. Accordingly, IT IS ORDERED that application File Nos. I-T-C- 89-081, I-T-C-89-082 and I-T-C-89-083 ARE GRANTED, and:

(a) TA is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Allnet's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. No. 1 between the U.S. and those points listed in those tariffs; and

(b) TMCL and ACLD are authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORION NETWORK SYSTEMS, INC. File No. I-T-C-89-078

Application for authority to acquire and operate facilities for service to the Federal Republic of Germany.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 15, 1989; Released: May 24, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on March 15, 1989 by Orion Network Systems, Inc., (OrionNet), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service to the Federal Republic of Germany (FGR). The application was placed on public notice on March 22, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the FRG by OrionNet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-078 IS GRANTED, and OrionNet is authorized to:

a. lease from Comsat and operate up to 60 voice-grade satellite circuits between OrionNet's Shenandoah Court, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the FRG, furnished by OrionNet's correspondent in the FRG;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide OrionNet's regularly authorized services, including switched voice, between the U.S. and the FRG and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between OrionNet and its correspondent in the FRG, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of

The County of Los Angeles MJF-56
Facilities Management Department
1110 North Eastern Avenue
Los Angeles, CA 90063

For a Waiver of the Construction
Provisions of Section 94.65(a) of
the Commission's Rules

ORDER

Adopted: May 16, 1989; Released: May 24, 1989

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. On December 28, 1988, the County of Los Angeles, California (County), filed a request for waiver of the automatic license cancellation provisions of Section 94.65(a) of the Commission's Rules, 47 C.F.R. § 94.65(a). The County's request for waiver and extension of the one year operational requirement of Section 94.65(a) of the Rules relates to point-to-point Private Operational-Fixed Microwave Radio Service (OFS) stations WNES 498, WNES 506, WNES 507, WNES 508, WNES 509 and WNES 502. The one year operational period for all but one of these stations expired in November of 1988, prior to the County's waiver request.[1] The one year period for the remaining station, WNES 502, expires on May 13, 1989. As discussed below, in view of the important public interest considerations involving the health and safety of the residents of the Los Angeles area, we are granting the County's waiver request and extending the operational date for the subject stations for an additional one year period.

II. BACKGROUND

2. The County of Los Angeles, California, consists of an area of over 4,000 square miles and has a population of approximately 12 million people. The County states that it is in the process of replacing its Sheriff Department's two-way radio system, currently operating in the 39 MHz band, with a microwave system designed to interconnect County-wide radio sites with a centralized dispatch center. This comprehensive system has been approved by the County Board of Supervisors with a projected cost of 58.8 million dollars and is currently under construction. In this regard, the County emphasizes that the microwave equipment required for implementation of its system has been delivered by the equipment contractor. Additionally, the County reports that it has already placed in operation five OFS stations that are components of its new system.[2] The County anticipates that its new system will greatly improve the Sheriff Department's communications capacity and area of coverage. Upon completion, the system will support approximately 2,000 mobile and 4,000 portable units.

3. In support of its waiver request, the County maintains that a variety of factors have contributed to its inability to implement the entire system within the first year of authorization. For example, the County cites delays inherent in the budgetary, equipment procurement, and site acquisition procedures as fundamental problems. The County states that this large and complex multi-million dollar communications system has required extensive coordination between County and state agencies for microwave site acquisition and building permits. The County, of necessity, could not begin construction until this negotiation and coordination process was completed.

4. Having acquired access to the requisite transmitter locations, the County indicates that it has encountered several other unanticipated problems. The system is designed to serve Santa Catalina Island as well as the entire coastal region of Los Angeles County. Testing of the initial microwave paths revealed that providing microwave service to the County's prime Santa Catalina Island site on Black Jack Mountain caused interference problems with several mainland sites. These paths are unique because they include 30 mile ocean paths in addition to the land portions at both ends. The County states that it expects to have reliable paths finalized and operational by June 30, 1989.

5. The County reports that it has also experienced a delay associated with its attempts to acquire as a transmitter location the former Puente Hills Nike missile site from the federal government. The County anticipates that the acquisition of this site should be completed by January 1990. Another delay has arisen as a result of the recent exposure of contaminated soil during the grading of the County's site at Baldwin Hills.

6. In summary, the County states that this new system is vital to the public safety and law enforcement efforts of its Sheriff's Department. It submits that many of the 38 sites associated with its system have already been constructed and that the equipment for the remaining sites has been delivered. Finally, the County maintains that it has no feasible alternative to its proposed microwave system other than telephone circuits. Many of the County's rugged areas, however, have no telephone service. Moreover, reliance on telephone lines in times of emergencies, particularly in view of the risk of earthquakes, is not an acceptable mode of operation for a public safety communications network.

III. DISCUSSION

7. A fundamental policy of the Commission is to ensure that the limited OFS spectrum is placed in operation promptly or recovered for reassignment to others who have immediate communications needs. To this end, Section 94.65(a) of the Commission's Rules requires system implementation within one year of the initial license grant. This rule section permits a licensee to request an extension of this implementation period upon a showing of good cause provided that the extension request is filed at least 30 days prior to the expiration of the one year

operational deadline. This provision places the obligation on the licensee to come forward to seek timely extensions.[3]

8. The grant of a waiver seeking the reinstatement of licenses that have cancelled automatically for failure to construct in accordance with the Commission's Rules (*i.e.*, the licensee did not seek a timely extension as set forth in Section 94.65(a) of the Rules) requires an extraordinary showing of compelling circumstances.[4] Ordinarily, where commercial entities are concerned, waiver relief based on assertions of equipment and site acquisition problems, system novelty and complexity, or developmental expenditures will not be favorably entertained.[5] Such considerations are outweighed by the public benefit of reassigning unused frequencies to other private parties that are proposing similar service.

9. In the instant case, however, where public safety issues are involved, we must view the requested waiver from a different perspective. Unlike communications services that can be provided to the public by any one of a number of licensees of facilities such as SMR or private carrier paging systems, station operations by municipal licensees are unique and are not interchangeable. Governmental entities, unlike commercial licensees, have unique impediments to construction including budget and procurement cycles, legislative or referendum matters, and hurdles and complexities associated with inter-agency and intra-agency negotiations.[6] We have recognized in the Private Land Mobile Radio Services that such factors may warrant additional time to place a system in operation.[7] Thus, the loss of a municipal radio station license can mean the loss of communications service that is vital to the public health and safety of a community that cannot be readily duplicated. When a Part 94 licensee does not request additional time until after its authorization has cancelled, as in the case for all but one of the subject licenses, it must overcome a high burden to demonstrate that such relief is in the public interest.[8] Recovery of the OFS channels in issue will undoubtedly adversely affect the ability of the Los Angeles County Sheriff's Department to protect the health and safety of the public at large. Under these unique and limited circumstances, and considering that the County has made substantial efforts to complete its system implementation, a waiver of the provisions of Section 94.65(a) of the Rules is warranted.[9] Consequently, we are granting the requested waiver and extending the implementation deadline for a period of one year from the date of this decision.

10. ACCORDINGLY, pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, IT IS ORDERED that the County of Los Angeles' request for reinstatement of licenses for stations WNES 498, WNES 506, WNES 507, WNES 508 and WNES 509 IS GRANTED.

11. IT IS FURTHER ORDERED that the request of the County of Los Angeles for waiver and extension of the operational provisions of Section 94.65(a) of the Commission's Rules, 47 C.F.R. § 94.65(a), for stations WNES 498, WNES 502, WNES 506, WNES 507, WNES 508 and WNES 509 IS GRANTED. The extension of the implementation period for these stations expires one year from the release date of this decision.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] The operational deadlines for these stations were November 10 or November 23, 1988.

[2] These stations are WNES 499, WNES 500, WNES 501, WNES 503 and WNES 504.

[3] *See* Memorandum Opinion and Order and Declaratory Ruling in the Matter of Associated Information Services, Inc. (AIS), 3 FCC Rcd 5617 (1988), *recon. pending.*

[4] AIS, 3 FCC Rcd at 5618-19. *See also* P & R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984); and Digital Radio Network, Inc., 3 FCC Rcd 5383 (1988).

[5] P & R Temmer v. FCC, *supra*. *See also* Texas Two-Way v. FCC, 98 FCC 2d 1300 (1984), *aff'd sub nom.* Texas Two-Way, Inc. v. FCC, 762 F.2d 138 (D.C. Cir. 1985); Business Radio Communications, Inc., 102 FCC 2d 714, 716-17 (1985).

[6] *See* the Bureau's Memorandum Opinion and Order granting a rule waiver to the New York City Transit Authority, 3 FCC Rcd 5621 (1988).

[7] Section 90.629 of the Commission's Rules, 47 C.F.R. § 90.629, recognizes the needs of governmental licensees in the Private Land Mobile Radio Services for extended implementation schedules and permits such licensees a period of up to three years to place their systems in operation.

[8] AIS, *supra*, 3 FCC Rcd at 5618.

[9] In considering a request for rule waiver, we must consider whether a waiver would undermine the public interest policy the rule seeks to protect. WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969); Thomas Radio v. FCC, 716 F.2d 921 (D.C. Cir. 1983). In this instance our grant of a waiver is consistent with the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-264

In the Matter of

Amendment of Section 73.202(b),	RM-5729
Table of Allotments,	RM-6097
FM Broadcast Stations.	
(Live Oak and St. Augustine, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1989; Released: May 24, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for reconsideration filed March 1, 1989, by Day Communications, Inc. ("Day"), licensee of Station WQHL(FM), Live Oak, Florida, successor to the petitioner in this proceeding. Day seeks reconsideration of the *Report and Order*, 4 FCC Rcd 758 (1989), which denied its predecessor's request to substitute Channel 251C for Channel 251C1 at Live Oak and instead granted the request of Shull Broadcasting Co., Inc., to substitute Channel 250C2 for Channel 249A at St. Augustine, and modify the license of Station WUVU(FM) to specify operation on the higher powered channel. However, on April 12, 1989, Day requested that its petition for reconsideration be withdrawn.

2. Accordingly, pursuant to the authority contained in Section 0.283 of the Commission's Rules, the aforementioned petition for reconsideration IS HEREBY DISMISSED.

3. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b), RM-6572
Table of Allotments,
FM Broadcast Stations.
(Chester and Wedgefield,
South Carolina)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 4, 1989; Released: May 24, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of a letter ruling dated May 13, 1988, by the Deputy Chief, Policy and Rules Division, Mass Media Bureau, filed by the Chester County Broadcasting Company ("CCBC"), licensee of station WDZK-FM, Chester, South Carolina. The letter ruling returned CCBC's petition to amend the FM Table of Allotments by substituting Channel 257C2 for Channel 257A at Chester, and Channel 238A for Channel 257A at Wedgefield, South Carolina. CCBC also requested modification of its license for Station WDZK-FM to specify operation on Channel 257C2. Three parties, Voyager Communications ("Voyager"), licensee of station WMAG-FM, Channel 258C, High Point, North Carolina, Wedgefield Communications ("Wedgefield"), licensee of station WIBZ-FM, Channel 257A, Wedgefield, South Carolina, and Millenium Communications of Charleston ("Millenium"), licensee of station WWWZ-FM, Channel 228A, Summerville, South Carolina, filed objections to CCBC's petition for reconsideration. CCBC filed timely responses to each opposition.[1]

BACKGROUND

2. CCBC noted in its petition to amend the Table of Allotments that the substitution of Channel 257C2 for Channel 257A at Chester would result in a violation of the Commission's minimum mileage separation requirements,[2] as Channel 257C2 would be short-spaced by 1.99 km to Channel 258C at High Point. CCBC requested a waiver of the minimum mileage separation requirements, claiming that there would be no actual interference with Channel 258C, as the licensee on that channel is required to directionalize its signal away from Chester in order to avoid interference with Channel 259C, Kannapolis, North Carolina.[3] CCBC claimed that the Commission has previously expressed a willingness to waive minimum mileage requirements, provided a compelling public interest is demonstrated. CCBC maintained its proposal would not result in short-spacing with Channel 258C had the Commission not permitted the sizable short-spacing between that channel and Channel 259C at Kannapolis. CCBC argued that compelling public interest benefits justify grant of its waiver request, claiming that its proposal would result in an expanded primary service area in a region with no class C stations, provision of a second through fifth FM service for 14,904 persons, improved service for a region with an expanding population, and improved emergency broadcast capacity for an area surrounding the Catawba Nuclear Station. Finally, CCBC noted that it had received reasonable assurance of the availability of land for a tower site.

3. The Division's letter ruling noted that, in previous cases, the allotment of a first local FM service, generally held to be of a higher priority than an upgrade of existing service, did not constitute a sufficiently compelling public interest benefit to warrant a waiver of the minimum spacing requirements. The Division found that provision of regional and increased services to already served areas to be an insufficient public interest benefit in this case. Accordingly, CCBC's petition was returned as not acceptable for consideration.

4. In its petition for reconsideration, CCBC alleges that it was unfairly prejudiced by the Commission's failure to articulate clear and definite standards for meeting a compelling public interest standard, and by the Division's failure to take a "hard look" at the waiver request. CCBC claims that although the Commission has expressed a willingness to waive the minimum mileage requirement if the compelling interest standard is met, the Commission has never illustrated specifically what a petitioner must demonstrate to meet the standard. CCBC claims the Division's failure to describe in its letter ruling the precise standard necessary to obtain a waiver constitutes a violation of administrative due process, as an agency must have clear and definite standards for waiver of its rules and give applicants notice of the standards.

5. CCBC claims the Division unduly relied upon *Vass, North Carolina*, 45 RR 2d 1741 (1979) and *Portland, Tennessee*, 35 FCC 2d 601 (1972), in denying CCBC's petition. CCBC views *Vass* and *Portland* as factually distinguishable from, and presenting fewer public interest benefits than, its waiver request. CCBC notes that the town of Vass had a population of 885, compared to 8,447 for Chester. Vass' proposed short-spacing was 6 km to one station and 8 km to another, whereas Chester's is 1.99 km to one station. CCBC claims that Vass was served by a nearby station in the same county, and a Vass station would have duplicated coverage of the nearby station, whereas Chester is unable to provide a 1 mV/m signal to the entire county in which it is located, and an upgraded station would provide a "regional FM service to a large area with no local service." Also, CCBC claims the Vass proposal would not have provided a new second FM service, whereas its proposal would provide a new second FM service to 1,738 persons. CCBC claims the petitioners in *Portland* relied primarily on the argument that the community had no licensed broadcast station, whereas CCBC discussed several public interest benefits in its petition for rule making.

6. CCBC states that its proposal would not result in short-spacing had the Commission not previously allowed Channel 285C at High Point to be short-spaced in the direction of Chester, 152 km. from its allotment reference point, in order to avoid interference with Channel 259C, Kannapolis.[4] CCBC restates the public interest benefits that would result from its proposal, such as the provision of a first regional FM service to three counties, expanded service to rural areas and small towns, and the provision

of a new second through fifth FM service to a number of persons. CCBC also notes it has obtained reasonable assurance of a tower site, citing the lack of a definite site as a reason why the Commission has rejected previous requests for short-spacing waivers.

7. Finally, CCBC alleges that the Division failed to take a "hard look" at the beneficial effect of a waiver in regard to CCBC's ability to provide increased emergency broadcast capabilities to two counties within a 50 mile radius of the Catawba Nuclear Station. CCBC claims there are three South Carolina FM stations in the region in addition to CCBC's, two of which do not provide service to the entire two county area, and the third of which is noncommercial with a small audience. CCBC also claims that the South Carolina AM stations in the area are daytime stations, have small audiences, or do not provide a signal to the entire two county area. CCBC claims it could provide emergency information to both counties if it is permitted to upgrade. While the region receives broadcasts from North Carolina, CCBC states that North and South Carolina operate different nuclear emergency broadcast systems that provide safety information only for their respective residents. CCBC claims it could provide emergency information to both counties if it is permitted to upgrade.

8. Voyager filed an opposition to CCBC's petition, stating that it hopes eventually to eliminate or reduce its short-spacing and operate omni-directionally. Voyager claims that omni-directional operation would be difficult if CCBC received its requested allotment. Voyager also alleges that CCBC's claims regarding service to underserved areas are exaggerated and estimated in a manner inconsistent with Commission rules and precedent. In support of its claims, Voyager submits a technical statement.

9. Wedgefield filed an opposition, citing Commission decisions that denied short-spaced assignments at the allotment stage. Wedgefield argues that the short-spacing distance in CCBC's request is irrelevant, as the Commission will not consider the degree of short-spacing in reviewing requests at the allotment stage. Wedgefield, citing to Commission precedent, claims that a waiver requires at least the provision of substantial first FM or aural service, whereas CCBC's proposal provides no first service, and the two counties that CCBC would serve are already served by four FM stations. Wedgefield claims CCBC was not prejudiced by a lack of clarity regarding the standards applied to determine if a waiver is "in the public interest", as the Commission has stated that short-spacing is contrary to the public interest. Wedgefield notes that courts will normally defer to agency interpretations of the public interest, and that lack of detailed standards for waiver of a rule is not a fatal flaw, because it is impossible to define such standards in advance.

10. In reply, CCBC claims that Voyager's objections are speculative, as Voyager objects to the possibility of future interference if Voyager modifies its facilities. CCBC also alleges that Voyager fails to demonstrate how CCBC's claims of providing a new FM service to underserved areas are overstated or calculated inconsistently with Commission rules. CCBC claims that Voyager should have, at a minimum, demonstrated what it believed the proposed service to underserved areas would actually be. As a result, CCBC believes that Voyager's opposition should be dismissed for failing to submit any adequate or specific allegations of fact sufficient to warrant denial of CCBC's modification request.

11. CCBC disputes Wedgefield's statement that short-spacing is contrary to the public interest, noting that the Commission has held that a waiver may be granted upon a showing of compelling public interest benefits. As for Wedgefield's claim that CCBC's request should be denied because it does not provide public interest benefits as weighty as a first FM or aural service, CCBC claims that provision of a first FM service is not a prerequisite for a waiver, but is illustrative of a compelling public interest benefit. CCBC reiterates its position that the Commission failed to take a hard look at its waiver request and failed to inform CCBC of the specific standards for waiver of the rule. CCBC claims that operation of its station at Channel 257C2 could not cause interference with Voyager's station, as the present directionalization of its signal away from Kannapolis would also prevent any interference with a Class C2 station at Chester.

12. Millenium filed an opposition, claiming that if Channel 238A is not substituted for Channel 257A at Wedgefield, then Channel 238A will be available as a means to settle a dispute in another proceeding to which Millenium is a party.[5] Millenium notes that the Commission places a heavy burden on a petitioner seeking a short-spaced assignment, and has declined to grant a waiver on circumstances far more compelling than those presented by CCBC.

13. In reply, CCBC reiterates its earlier arguments concerning the Commission's failure to articulate what would constitute a compelling public interest benefit for waiver purposes, and argues that provision of a first service is illustrative, but not necessarily a prerequisite, for grant of a waiver.

DISCUSSION

14. After full consideration of the pleadings in this case, we deny CCBC's petition for reconsideration. CCBC's petition was properly dismissed as unacceptable for filing.

15. CCBC has maintained that no actual interference would result from the allotment of Channel 257C2 at Chester, even though the allotment would be short-spaced to Channel 258C, High Point, by 1.99 km,[6] as Voyager operates a directional antenna at High Point. While the Commission has stated its willingness to consider the use of directional antennas as a means of protecting short-spaced facilities from objectionable interference as a factor in the station assignment process, it has clearly stated that it is unwilling to consider the proposed use of directional antennas as a factor in the allotment process.[7] Therefore, Voyager's operation of a directional antenna at High Point is not relevant to this proceeding.

16. The Commission carefully protects the Table of Allotments, and a waiver of the Commission's minimum spacing requirements will be granted only in those rare instances in which there is a compelling need for departure from established spacing requirements.[8] It is the task of the petitioner to demonstrate that such a compelling need is present, and that the Commission should waive the already established standards for minimum spacing between stations. CCBC's claim that it was unfairly prejudiced by the Commission's failure to articulate clear and definite standards for defining a "compelling need" is unfounded, as CCBC had a great deal of guidance in

determining the factors encompassed in the standard through examination of the many previous decisions in this area. The Commission may base the standard for a waiver on factors gleaned from previous cases, as "[s]ound administrative procedure contemplates waivers, or exceptions granted only pursuant to a relevant standard--expressed *at least* in decisions accompanied by published opinions . . . " *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969) [emphasis added].

17. CCBC has failed to demonstrate a compelling need for the additional service that an allotment of Channel 257C2 could provide to Chester if the Commission waived the minimum mileage separation requirements. Of particular relevance in reaching this conclusion are the Commission's decisions in *Portland* and *Vass*. These cases indicate that short-spaced allotments will be made only upon a showing of compelling need, and that provision of first FM or first aural service (traditionally high priority considerations in allotting FM channels) does not necessarily constitute a sufficiently compelling interest to warrant a waiver. We note that these cases were decided before the Commission adopted the current FM allotment criteria and stated that it would no longer distinguish between AM and FM services when making allotments.[9] Emphasis on providing first FM service is therefore misplaced, as the highest priority under the present FM allotment criteria is provision of first full-time aural service.[10] CCBC fails to show that its proposal would provide a first or second aural service to any area. CCBC's proposal obviously would not result in a first local service to Chester, as Channel 257A is presently allotted to the community. According to CCBC, its proposal would result in a first regional FM reception service to several counties, and a second through fifth FM reception service to a number of people in the listening area.[11] A "regional" service, however, is not synonymous with a "local" service. A gain in population resulting from a substitution of a higher class channel is attributable to upgraded service, and service upgrades are generally considered under the fourth allotment criteria of other public interest matters. We do not find the service gains that would result from an upgrade of CCBC's station to be so substantial as to warrant a waiver of the Commission's minimum spacing requirements.[12]

18. We are also unconvinced that a substitution of Channel 257C2 for Channel 257A at Chester is necessary in order to ensure that residents of York and Chester Counties, South Carolina, receive emergency information in the event of an accident at the nearby Catawba Nuclear Station. York and Chester Counties do not appear to suffer a lack of radio reception service. According to a brochure distributed to area residents by the Catawba Nuclear Station, fourteen South Carolina radio stations (including WDZK-FM) are designated as emergency broadcast stations for the area around the nuclear plant.[13] Furthermore, even though some of these stations may have small audiences, or operate only during the day, CCBC does not claim in its pleadings that even one person in this area would be unable to receive emergency broadcasts at any time from a South Carolina station in the event of a nuclear accident. CCBC has also failed to convince us that public safety interests require one station to be able to provide a signal to the entire two-county area. The existing emergency warning system is fully capable of informing South Carolina residents of emergency procedures. Although North and South Carolina maintain separate nuclear emergency broadcast systems, South Carolina residents have been informed, through the Catawba Nuclear Station brochure and announcements following emergency broadcast system tests, that they are to listen to South Carolina radio stations for emergency information.[14] Upon hearing an emergency broadcast over a North Carolina station, South Carolina residents know to tune to a South Carolina station, and there are apparently a sufficient number of South Carolina stations capable of relaying the information to area residents.

19. CCBC has failed to convince us that a waiver of our minimum spacing requirements is necessary. We do not consider the additional service that would result from an upgrade of Channel 257A at Chester, nor the additional emergency broadcast capacity that the upgraded station may offer to the area surrounding the Catawba Nuclear Station, to be sufficiently compelling to overcome the Commission's traditional prohibition against the creation of short-spaced allotments.

20. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by the Chester County Broadcasting Company IS DENIED.

21. IT IS ALSO ORDERED, That the motion of the Chester County Broadcasting Company to dismiss the "Opposition to Petition for Reconsideration" filed by Voyager Communications IS DENIED.

22. IT IS ALSO ORDERED, That the motion of the Chester County Broadcasting Company to dismiss the "Opposition to Petition for Reconsideration" filed by Wedgefield Communications IS DENIED.

23. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] CCBC claims the oppositions of Voyager and Wedgefield were untimely--one week late for Voyager and one month late for Wedgefield--in violation of Commission Rule 1.106(g), and should be dismissed. However, Commission Rule 1.429 governs petitions for reconsideration in rule making proceedings, and Section 1.429(e) states that the time for filing oppositions to a petition for reconsideration runs from the date of public notice. Public notice of CCBC's Petition for Reconsideration was published September 26, 1988, triggering a filing deadline for comments of October 12, 1988, and oppositions of October 24, 1988 (Public Notice 1749, 53 FR 37346). The oppositions of Wedgefield and Voyager were received well in advance of the due dates. Accordingly, CCBC's motions to dismiss the oppositions of Wedgefield and Voyager are denied.

[2] Commission Rule 73.207, 47 CFR § 73.207.

[3] CCBC claimed that Channel 258C is short-spaced by 152 km to Channel 259C at Kannapolis.

[4] The short-spacing between the High Point and Kannapolis allotments is permitted pursuant to Commission Rule 73.213, 47 CFR § 73.213, which provides certain exceptions to the minimum mileage spacing requirements for stations authorized prior to November 16, 1964, at locations that do not meet the spacing requirements.

[5] *See Notice of Proposed Rule Making (Summerville, SC)*, 3 FCC Rcd 2189 (1988).

[6] As CCBC has received reasonable assurance of the availability of a tower site, it is likely that the actual short-spacing of Channel 257C2, if allotted, would be 1.99 km.

[7] *Amendment of Part 73 of the Commission's Rules to Permit Short - Spaced FM Station Assignments by Using Directional Antennas (Report and Order)*, MM Docket No. 87-121, 54 FR 9800, March 8, 1989.

[8] *See Denver, Colorado*, 46 RR 2d 1379 (1980).

[9] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91-92 (1982).

[10] The FM allotment criteria are (1) provision of first full-time aural service, (2) second full-time aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). Id. at 92.

[11] We will assume that CCBC's estimates of the population that would receive service following an upgrade of Channel 257A are correct. It is unnecessary to determine whether, as Voyager alleges, CCBC exaggerated these figures, as the ultimate result in this case would be the same even if the increased service area was smaller than CCBC claims. Accordingly, we will not dismiss Voyager's opposition as requested by CCBC.

[12] In *Millington, Maryland*, 45 RR 2d 1689 (1980), the Commission rejected a request for a minimum mileage waiver, even though the petitioner proposed a first *local* service to a community (as contrasted with CCBC's proposal for first *regional* service), and second and third service to an additional 14,254 persons (more than twice the number of persons who would receive similar service under CCBC's proposal). We also rejected the *Millington* petitioner's rationale that the short-spacing would result in no actual interference.

[13] CCBC "Petition for Reconsideration" at exhibit 2.

[14] CCBC "Petition for Reconsideration" at exhibit 2, p. 2, exhibit 1, p. 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-493

In the Matter of

Amendment of Section 73.202(b),	RM-6431
Table of Allotments,	RM-6445
FM Broadcast Stations.	
(West Point and Blair, Nebraska)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 4, 1989; Released: May 24, 1989

By the Chief, Allocations Branch:

1. At the request of Kelly Communications, Inc. ("Kelly") and LDH Communications, Inc. ("LDH"), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 6122 (1988), alternatively proposing (1) the substitution of Channel 300C1 for Channel 300A at West Point, Nebraska, and the modification of Kelly's construction permit for Station KWPN-FM to specify the higher class channel, or (2) the substitution of Channel 299A for Channel 292A at Blair, Nebraska, and the modification of LDH's license for Station KBWH-FM to specify the alternate Class A channel. Comments were filed by Kelly and LDH. Reply comments were filed by Kelly.[1] On April 6, 1989, LDH withdrew its petition for the substitution of channels at Blair. Therefore, it is no longer necessary to compare the two proposals.

2. Kelly reiterates its intention to apply for Channel 300C1, if allotted to West Point. It states that the area within Station KWPN-FM's 60 dBu contour will increase from 1,871 to 16,286 square kilometers, thus increasing the population which it serves from 16,185 to 215,124 persons.

3. Based on the above information, we believe the public interest will be served by substituting Channel 300C1 for Channel 300A at West Point, Nebraska, since it could permit Station KWPN-FM to expand its service area. Channel 300C1 can be allotted to West Point in compliance with the Commission's minimum distance separation requirements and can be used at its licensed site.[2] As proposed, we shall also modify Kelly's license to specify operation on the higher powered channel.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 7, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
West Point, Nebraska	300C1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Kelly Communications, Inc. for Station KWPN-FM, West Point, Nebraska, IS MODIFIED to specify operation on Channel 300C1, in lieu of Channel 300A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the petition of LDH Communications, Inc. to substitute Channel 299A for Channel 292A at Blair, Nebraska, IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] By *Order* of January 11, 1989, the Commission denied the joint request of LDH and Kelly for a thirty-day extension of time in which to file reply comments. By *Order* of February 1, 1989, the Commission denied the later request of LDH for an additional thirty day extension of time. However, due to the fact that counsel for LDH had just withdrawn from the proceeding, the *Order* stated that we would consider a motion for acceptance of late-filed reply comments if submitted no more than two calendar weeks after the release of the February 1 *Order*. LDH did not file reply comments.

On February 15, 1989, CVC Capital Corporation ("CVC"), a Federal licensee under the Small Business Investment Act of 1958, filed a request that it be granted the status of Special Intervenor and granted an extension of time to file reply comments. CVC states that it has provided substantial financing to LDH and as a result acquired a security interest in a substantial portion of LDH's outstanding capital stock. Alleging that LDH has defaulted in its 1983 loan agreement with CVC, it has

recently filed a Complaint in the United States District Court for the Southern District of New York requesting the Court to direct LDH and its principals to transfer ownership and control of their pledged LDH stock to CVC and permit CVC to operate and exercise control over Station KBWH-FM, subject to prior Commission approval. CVC is not the licensee of Station KBWH-FM and thus cannot make a present commitment to prosecute an application for Channel 299A if the license is so modified. In order for us to take action on a requested license modification, we must have a present commitment from the current licensee. Therefore, in light of LDH's withdrawal, CVC's pleadings and Kelly's responses thereto are moot and will not be considered.

[2] The coordinates for this allotment are North Latitude 41-47-06 and West Longitude 96-40-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-544

In the Matter of

Amendment of Section 73.202(b), RM-6487
Table of Allotments,
FM Broadcast Stations.
(Shadyside, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 5, 1989; Released: May 24, 1989

By the Chief, Allocations Branch:

1. At the request of Adventure Three, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 7068 (1988), proposing the substitution of Channel 239B1 for Channel 239A at Shadyside, Ohio, and the modification of its construction permit for Station WBJY to specify the higher powered channel.[1] Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 239B1 for Channel 239A at Shadyside since it could enable Station WBJY to expand its coverage area. As proposed, we shall also modify petitioner's construction permit for Station WBJY to specify operation on the higher powered channel. Channel 239B1 can be allotted to Shadyside in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.0 kilometers (4.4 miles) north to accommodate petitioner's desired transmitter site.[2] Canadian concurrence has been received since Shadyside is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 7, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Shadyside, Ohio	239B1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Adventure Three, Inc. for Station WBJY, Shadyside, Ohio, IS MODIFIED to specify operation on Channel 239B1, in lieu of Channel 239A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The petitioner was previously known as Arthur V. Belendiuk d/b/a Shadyside Wireless.

[2] The coordinates for this allotment are North Latitude 40-02-00 and West Longitude 80-45-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 17, 1989

NECA FILES PETITION FOR EXPEDITED WAIVER OF SECTION 69.307 OF THE COMMISSION'S RULES

On May 9, 1989, the National Exchange Carrier Association, Inc. (NECA) filed a petition for expedited waiver of Section 69.307 of the Commission's Rules and Regulations. Section 69.307 directs exchange carriers to allocate General Support Facilities investment (GSF) among the access elements on the basis of the combined investment in Central Office Equipment, Information Origination/Termination Equipment and Cable and Wire Facilities (C&WF), excluding Category 1.3. NECA requests an expedited waiver to permit its traffic sensitive pool participants to include Category 1.3 C&WF investment in the apportionment of GSF for 1988 and through the current annual access tariff period ending June 30, 1990. NECA states that the Commission's accounting, separations and access conformance rule changes effective January 1, 1988, result in a significant increase in the revenue requirement of small exchange carriers participating in its traffic sensitive pool. NECA asserts that this revenue requirement shift will produce 1988 earnings significantly below authorized levels and will adversely affect 1989 earnings and traffic sensitive rate levels for the members of its traffic sensitive pool. NECA requests that the Commission act on its petition by June 15, 1989, in order to allow its member companies to use the waiver for GSF allocation in annual 1988 cost studies.

Interested parties may file comments on NECA's petition no later than **June 1, 1989.** Replies should be filed by **June 12, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812 and to International Transcription Services, Inc. 2100 M Street, N.W., Washington, D.C. 20036.

Copies of NECA's petition may be obtained from International Transcription Services, Inc., (202) 857-3800. A copy is also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N.W., Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 15, 1989

COMMISSION FILES PETITION FOR REHEARING *EN BANC* IN *SHURBERG v. FCC*

On March 31, 1989, a divided panel of the U.S. Court of Appeals of the D.C. Circuit struck down the distress sale policy as unconstitutional, in *Shurberg Broadcasting of Hartford, Inc. v. FCC.*

The Commission has voted 2-1, with Chairman Patrick dissenting, to instruct the General Counsel to petition the court for rehearing *en banc* and, in so doing, to defend the constitutionality of the distress sale policy.

In accordance with these instructions, the General Counsel today filed with the court a petition for rehearing reflecting the views of Commissioners Quello and Dennis. Chairman Patrick has set forth his dissenting views in a statement attached to this Notice.

FEDERAL COMMUNICATIONS COMMISSION*

* Action by the Commission May 15, 1989, by Public Notice (FCC 89-157). Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing a statement.

DISSENTING STATEMENT
OF
CHAIRMAN DENNIS R. PATRICK

In re: Petition for Rehearing and Suggestion For Hearing En Banc filed in *Shurberg Broadcasting of Hartford, Inc. v. FCC,* No. 84-1600 (D.C. Cir.)

The issue before the D.C. Circuit in both *Shurberg Broadcasting of Hartford, Inc. v. FCC,* No. 84-1600 (D.C. Cir., Mar. 31, 1989), and *Winter Park Communications, Inc. v. FCC,* No. 85-1755 (D.C. Cir., Apr. 21, 1989), properly framed, is whether the court's opinion in *West Michigan Broadcasting Co. v. FCC,* 735 F. 2d 601 (1975), remains valid in light of subsequent Supreme Court decisions. *See City of Richmond v. J. A. Croson Co.,* 57 U.S.L.W. 4132 (U.S. Jan 23, 1989); *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986). Had my fellow Commissioners agreed to discuss *all* relevant case law when requesting the court to examine this issue, I would have unhesitatingly agreed.

The Commission's minority preference policies have a tortured past. The Commission initially took the position that minority preferences should be granted only after the minority applicant clearly demonstrated that program and viewpoint diversity would be fostered through minority ownership. After being directed by the D.C. Circuit to presume a nexus between minority ownership and program diversity,[1] the Commission developed various preferences designed to promote minority ownership, including the distress sale policy at issue in *Shurberg,* the comparative preference policy and the tax certificate policy. *See Policy Statement on Minority Ownership of Broadcast Facilities,* 68 F.C.C. 2d 979 (1978). The Commission later extended the comparative preference policy to females. *See Mid-Florida Television Corp.,* 69 F.C.C. 2d 607, 652 (1978). The constitutionality of that policy was challenged in *Steele v. FCC,* 770 F. 2d 1192 (D.C. Cir. 1985), *vacated and rehearing en banc granted,* Order of Oct. 31, 1985, *remanded* Order of Oct. 9, 1986. At that point, the Commission believed that "both the gender and racial preference schemes conflict with equal protection standards under the Constitution." Supplemental Brief for the Federal Communications Commission at 13, *Steele v. FCC,* No. 84-1176 (D.C. Cir.). The Commission unanimously concluded, based on recent Supreme Court decisions applying equal protection analysis, that racial classifications may not be based on the assumption alone, without a factual predicate, that integrated minority owners will result in increased programming and viewpoint diversity. *Id.* As a result the Commission urged the court to permit us to undertake a comprehensive inquiry into the legal and factual predicate of our preference policies to determine whether a nexus truly does exist between minority ownership and program diversity. The Commission thereafter undertook such a study designed to provide a fuller record and to gather the empirical data necessary to support retention of our preference scheme. *Notice of Inquiry* in MM Docket No. 86-784, FCC 86-549, 1 FCC Rcd. 1315 (1986). Prior to the completion of this study, however, Congress decreed that the FCC expend no funds in fiscal year 1988 to complete its research or to change its preference policies.[2] In compliance with this congressional mandate, the Commission closed its rulemaking, without issuing any findings or conclusions, and reestablished all preference policies.

Two cases before the D.C. Circuit were thus made ripe for decision. First, in *Shurberg Broadcasting of Hartford, Inc., v. FCC,* No. 84-1600 (D.C. Cir March 31, 1989), the court was asked to rule on the constitutionaltiy of the distress sale policy. Second, in *Winter Park Communications Inc., v. FCC,* No. 85-1755 (D.C. Cir April 21, 1989), it was presented with the same question regarding minority preferences in the comparative hearing process. In both cases, the panels dealt with the continuing validity of *West Michigan,* in which the court had found the Commission's minority preference policy consistent with the Supreme Court's holdings in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) and *Fullilove v. Klutznick,* 448 U.S. 448 (1980).

In *Shurberg,* each of the three separate opinions treats *West Michigan* differently. Judge Silberman questions *West Michigan's* initial conclusion that there is a compelling government interest in increasing diversity of programming and goes on to conclude that it may, in any event, be undermined by the Supreme Court's recent decision in *Croson.* Judge MacKinnon's opinion does not address *West Michigan per se* but insists that preference policies must be narrowly tailored, while Judge Wald concludes that at least some of the conclusions in *West Michigan* have *not* been undermined by subsequent Supreme Court decisions.

In *Winter Park,* Judge Edwards finds the comparative preference policy to be constitutional under *West Michigan,* while Judge Williams, in a dissent, argues persua-

sively that *West Michigan* has been largely undermined by *Wygant* and *Croson*. Thus, we have five different opinions on the continuing validity of *West Michigan* and the constitutional standards to be applied to minority preference policies. To further trouble an already complex issue, the two panels have also given a range of opinions on the weight and meaning to be given to the Congressional appropriations limits regarding our preference policies.

In light of the importance and complexity of these issues, particularly given recent Congressional actions and the varying opinions in *Shurberg* and *Winter Park*, I would petition the D.C. Circuit to hear *Shurberg en banc* and support a petition for rehearing on *Winter Park*. Both cases could be considered together and the court could give us definitive guidance. But I cannot support my fellow Commissioners' approach of requesting only partial enlightenment in this area.

Nor can I agree with the substantive arguments they make. Recent Supreme Court precedent collectively make clear that racial and gender classifications are inherently suspect and will be subject to close and careful scrutiny.[3] Most significantly, after *Croson*, the standard of review required for *any* governmental classification based on race is strict scrutiny. *City of Richmond v. J. A. Croson Co.*, 57 U.S.L.W. 4132, 4139 (Part III-A) and 4146 (Scalia, J. concurring).

The first stage of equal protection analysis under strick scrutiny requires a determination as to whether there is a compelling government objective. The Supreme Court has only identified two compelling interests for race-based policies. First, such minority preference policies may be implemented to remedy past discrimination. *Fullilove*, 448 U.S. at 475.[4] Second, at least Justice Powell in *Bakke* believed that, for educational institutions, academic diversity is a compelling government interest.[5] *Bakke* 438 U.S. at 311-15 (opinion of Powell, J.).

From this second justification, the D.C. Circuit in *West Michigan* extrapolated to find "program diversity" in broadcasting a compelling interest. This premise, set out in *West Michigan*, relies on Justice Powell's opinion in *Bakke* that a diverse educational environment is a compelling goal that may be constitutionally promoted by certain admissions policies which recognize race as one of several factors. As racial diversity is only one aspect of a truly diverse student body, Justice Powell believed that a university could use race as one factor in a multi-factor admissions decision.[6]

Similarly, if one assumes program diversity to be a compelling goal, race is but one factor which may bear on diversity of viewpoint.[7] Because minority status is the exclusive criterion for use of the distress sale policy, I fail to see why that policy passes even Justice Powell's test. Outside the remedial context, the Supreme Court has *never* upheld a preference policy based solely on race, and has specifically rejected the use of minority set-asides as a means of promotion diversity. *Bakke*, 438 U.S. at 314-18.

Citing *Fullilove*, my fellow Commissioners see no reason why the court should not extend its findings in the remedial context to the diversity arena. I submit that one does not necessarily lead to the other. It is clear after the Supreme Court's decision in *Croson* that race-based measures are subject to the highest degree of scrutiny. Where evidence of past discrimination exists, the Court may well tolerate race-based *remedial* measures. But where the more nebulous goal of diversity is at issue, the most that even Justice Powell would permit is the consideration of race as one of several factors. There is no basis to think the Court would allow more.

Ensuring that minority perspectives can be aired in a diverse broadcast marketplace is an important policy goal which I support. But our station licensing and transfer policies must, above all else, guarantee equal protection of the laws to all Americans. As such, our race-conscious policies must be subjected to the most rigorous review to insure fidelity to this principle.

In this case, my fellow Commissioners have chosen to appeal a decision with which they disagree *(Shurberg)* and let stand a second decision with which they feel more comfortable *(Winter Park)* despite hopeless confusion and conflict in the relevant case law. The principle of "equal protection" deserves better.

May 15, 1989

FOOTNOTES FOR STATEMENT

[1] *TV 9, Inc. FCC*, 495 F.2d 929, (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

[2] *See Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1987). The appropriations legislation prohibits the Commission from using funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the Commission's policies premised on racial, ethnic or gender classification, except to: (1) close its proceeding investigating the preference policies; (2) reinstate prior policy; and (3) lift any suspension imposed on implementing the policies pending its investigation.

[3] *See e.g., City of Richmond v. J. A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989); *Wygant v. Jackson Board of Education*, 90 L. Ed. 2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[4] The Commission has never claimed that its preference policies are intended to remedy prior discrimination against minorities or to provide remedial benefits. It could be argued that Congress has separately adopted our policies as its own, with the justification that its policies are remedial. But Congress did not justify its funding decision as remedial. As my fellow Commissioners agree, Congress relied solely on a diversity rationale. FCC Petition for Rehearing at n.1.

[5] It is unclear after *Croson* whether Justice Powell's diversity rationale would be endorsed by the present Court. A plurality of the Court in that case quite clearly stated that classifications based on race should be "strictly reserved for remedial settings." *Croson*, 57 U.S.L.W. at 4139, *see also id.* at 4146 (Scalia, J., concurring). And Justice O'Connor, who had indicated some sympathy for Justice Powell's diversity rationale, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring), appears to have rejected that rationale in *Croson*. Justice Stevens interpreted Justice O'Connor's opinion as such a rejection. *Croson*, 57 U.S.L.W. at 4144 n.1 (Stevens, J., concurring in part), as has Judge Silberman, *Shurberg*, Wald opin. at 18 n.20 (dissenting), she herself would read that same opinion differently. With all due respect to Judge Wald, I must defer to the interpretation of *Croson* rendered by a member of the Supreme Court. Thus, in light of the Court's decision in *Croson*, whether the academic diversity rationale remains as a compelling government interest for race-based policies is an open question. Certainly then, extensions of that rationale cannot be supported.

[6] The plan before the *Bakke* court, however, employed a racial set-aside, which did not account for other diversity factors. As Justice Powell wrote in *Bakke*, "preferring members of any one group for no reason other than race or ethic origin is discrimination for its own sake. This the Constituion forbids." *Bakke*, 438 U.S. at 307. The Court thus struck that plan down as unconstitutional.

[7] As I have previously noted, however, the Commission has been prohibited from determining whether race *is* a factor in viewpoint diversity, that is, whether there is a nexus between minority ownership and programming.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 15, 1989

COMMISSION DECLINES TO SUPPORT REHEARING *EN BANC* IN *WINTER PARK v. FCC*

On April 21, 1989, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld the constitutionality of awarding minority preferences in the comparative hearing process, in *Winter Park Communication, Inc.v. FCC.*

The Commission has voted 2-1, with Chairman Patrick dissenting, not to support rehearing *en banc.*

FEDERAL COMMUNICATIONS COMMISSION*

* Action by the Commission May 15, 1989, by Public Notice (FCC 89-158). Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing a statement and Commissioner Dennis issuing a statement.

DISSENTING STATEMENT OF CHAIRMAN DENNIS R. PATRICK

For the reasons stated in my dissent to the petition for rehearing in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC,* No. 84-1600 (D.C. Cir., decided Mar. 31, 1989), I respectfully dissent to my fellow Commissioners' refusal to support rehearing in *Winter Park Communications, Inc.* v. *FCC,* No. 85-1755 (D.C. Cir., decided Apr. 21, 1989).

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

Re: *Winter Park Communications, Inc. v. FCC*

Frankly, I am puzzled that the Commission is issuing a press release announcing that we will not appeal a case we won. In light of Congress's specific appropriations language directing us to retain our minority ownership policies,[1] and our long-standing practice of presuming the constitutionality of policies mandated by Congress,[2] I would have expected the decision not to appeal to be by an automatic, 3-0 vote.

FOOTNOTES FOR STATEMENT

[1] Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

[2] *See, e.g., Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Section 1464,* 4 FCC Rcd 457 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-574

In the Matter of

Amendment of Section 73.202(b), RM-6478
Table of Allotments,
FM Broadcast Stations.
(Kirksville, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 5, 1989; Released: May 25, 1989

By the Chief, Allocations Branch:

1. Before the Commission is the the *Notice of Proposed Rule Making*, 3 FCC Rcd 7265 (1988), proposing the substitution of FM Channel 233C for Channel 233C1 at Kirksville, Missouri, and modification of the license for Station KRXL(FM), Channel 233C1, accordingly. The *Notice* was issued in response to a petition filed by KIRK, Inc. (petitioner). The petitioner filed untimely comments with a motion to accept.[1] No other comments were received.

2. As indicated in the *Notice*, Channel 233C can be allotted to Kirksville consistent with the Commission's spacing requirements at the petitioner's specified site.[2] We have authorized a modification of petitioner's license for Station KRXL(FM), Kirksville, to specify operation on Channel 233C in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 10, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kirksville, Missouri	229C, 233C, 300C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KRXL(FM), Kirksville, Missouri, IS MODIFIED to specify operation on Channel 233C, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In view of the fact that this proceeding is uncontested, we have accepted the comments for the purpose of allowing petitioner to reaffirm its interest in applying for the channel.

[2] The coordinates for Channel 233C at Kirksville are 40-14-34 and 92-25-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-119

In the Matter of

Amendment of Section 73.202(b), RM-6417
Table of Allotments,
FM Broadcast Stations.
(Stamping Ground, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1989; Released: May 25, 1989

By the Deputy Chief, Policy and Rules Division:

1. At the request of James P. Gray (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 256A to Stamping Ground, Kentucky as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 256A can be allotted to Stamping Ground in compliance with the Commission's minimum distance separation requirements with a 3.3 kilometer (2.1 miles) site restriction north of the community.[1] The site restriction is necessary to avoid a short spacing to Station WHNB(FM), Channel 257A, Harrodsburg, Kentucky.

3. In view of the fact that Stamping Ground, Kentucky, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Stamping Ground, Kentucky	--	256A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 17, 1989,** and reply comments on or before **August 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James P. Gray
10 Trinity Place
Fort Thomas, Kentucky 41075
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 38-18-04 and 84-40-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-74

In the Matter of

Amendment of Section 73.202(b),	RM-5649
Table of Allotments,	
FM Broadcast Stations.	
(Oxnard, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 4, 1989; **Released: May 25, 1989**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, in this proceeding, 2 FCC Rcd 1958 (1987), proposing the substitution of either Channel 275A or Channel 279A in lieu of Channel 271A at Oxnard, California. The channel substitution was requested by Golden West Broadcasters ("Golden West"), licensee of Station KMPC-FM, Channel 270B, Glendale, California, to permit the station to relocate its transmitter to a Verdugo Peak site within Glendale. The proposal would alleviate technical problems at its current site on Mount Wilson. Comments were filed by Golden West and Taxi Productions, Inc. ("Taxi"), licensee of FM Station KJLH, Channel 272A, Compton, California. Reply comments were filed by Golden West, Taxi and the law firm of Wilner & Scheiner.[1]

2. In its comments, Taxi contended that the proposed transmitter relocation would cause interference within the Station KJLH 1 mV/m service contour to an area of 202 square kilometers containing approximately 532,319 persons. However, on January 25, 1989, the Commission waived Section 73.211(b) of the Rules in order to allow modification of the Station KMPC-FM facilities at its present site on Mount Wilson (File No. BPH-85110UII). In this connection, Taxi concurs that this modification will improve service to Glendale while avoiding additional interference to Station KJLH. Therefore, Taxi has withdrawn its opposition in this proceeding.

3. In a related vein, the modification of the Station KMPC-FM facilities on Mount Wilson affects the Channel 271A allotment at Oxnard, California. The majority of the sites specified in the applications for this allotment meet the 105-kilometer spacing requirement with respect to Channel 270B at the Mount Wilson licensed site. However, our spacing requirements are predicated on stations operating with facilities in accordance with Section 73.211 of the Rules. The sites specified in these applications may be subject to interference from the modified Station KMPC-FM facilities and/or are at a location which may preclude principal city coverage of Oxnard. In order to avoid this possibility, we will substitute Channel 275A in lieu of Channel 271A at Oxnard.[2] In this regard, there are 17 applications pending for the Channel 271A allotment. These applicants will be permitted to amend their applications to specify the new channel and, where appropriate a new transmitter site, without loss of cut-off protection.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 10, 1989** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to read as follows:

Community	Channel No.
Oxnard, California	252A, 275A and 284B

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In addition, Motions to Strike were filed by Taxi directed against the reply comments by Golden West and Wilner & Scheiner. An Opposition to Motion to Strike and Comments on Motion to Strike were filed by Golden West. An Opposition to Motion to Strike was filed by Wilner & Scheiner. A reply to each of the oppositions was filed by Taxi. A Motion for Leave to File Supplement to Comments and a Supplement to Comments were filed by Taxi. Finally, an Opposition to Motion for Leave to File Supplement to Comments was filed by Golden West.

[2] The reference coordinates for Channel 275A at Oxnard are 34-13-08 and 119-12-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-443

In the Matter of

Amendment of Section 73.202(b),	RM-5366
Table of Allotments,	RM-5736
FM Broadcast Stations.	RM-5737
(Picayune, Mississippi, Ponchatoula, Louisiana, and Pascagoula, Mississippi[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 4, 1989; Released: May 25, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, in this proceeding, 1 FCC Rcd 948 (1986), proposing the substitution of Channel 291C2 in lieu of Channel 292A at Picayune, Mississippi, and the modification of the license of Station WRMH, Channel 292A, Picayune, Mississippi, to specify operation on Channel 291C2. Ponchatoula Broadcasting and Ponchatoula Broadcasting Company filed counterproposals both proposing the allotment of Channel 291A to Ponchatoula, Louisiana. WGUD Stereo, Inc., licensee of Station WGUD, Channel 292A, Pascagoula, Mississippi filed a counterproposal proposing the substitution of Channel 290C2 in lieu of Channel 292A and modification of its Station WGUD license to specify operation on Channel 290C2. Howes Broadcasting Company filed comments. Ponchatoula Broadcasting Company, Ponchatoula Broadcasting, and Howes Broadcasting Company filed reply comments. As discussed below, we will substitute Channel 291C2 in lieu of Channel 292A at Picayune and modify the license of Station WRMH to specify operation on Channel 291C2.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Howes Broadcasting Company, licensee of Station WRMH, Picayune, Mississippi, proposing the substitution of Channel 291C2 in lieu of Channel 292A at Picayune, and modification of the Station WRMH license to specify operation on Channel 291C2. In response to the *Notice of Proposed Rule Making*, both Ponchatoula Broadcasting Company and Ponchatoula Broadcasting filed counterproposals proposing the allotment of Channel 291A to Ponchatoula, Louisiana, as a first local service. WGUD Stereo, Inc. filed a counterproposal proposing a Channel 290C2 upgrade at Pascagoula and modification of the Station WGUD license.

3. On February 22, 1989, Ponchatoula Broadcasting Company and Ponchatoula Broadcasting withdrew their respective counterproposals for a new FM allotment at Ponchatoula. Similarly, WGUD Stereo, Inc. withdrew its mutually exclusive counterproposal for a Channel 290C2 upgrade at Pascagoula. In view of the fact that there is no longer a conflict with the proposed upgrade at Picayune, we will substitute Channel 291C2 in lieu of Channel 292A at Picayune and modify the Station WRMH license.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 10, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Picayune, Mississippi	291C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Howes Broadcasting Company, Inc. for Station WRMH, Picayune, Mississippi, IS MODIFIED to specify operation on Channel 291C2, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the aforementioned counterproposals by Ponchatoula Broadcasting, Ponchatoula Broadcasting Company, and WGUD Stereo, Inc. ARE DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Ponchatoula, Louisiana, and Pascagoula, Mississippi, have been added to the caption.

[2] The reference coordinates are 30-34-29 and 89-59-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

ORDER

Adopted: February 21, 1989; Released: February 22, 1989

By the Chief, Common Carrier Bureau:

1. In the *Strategic Pricing Order,*[1] the Commission completed the main phase of its investigation of the strategic pricing of selected special access services by local exchange carriers (LECs). The *Strategic Pricing Order* considered the lawfulness of pricing high capacity (HiCap) service and digital data services (DDS) to reflect strategic considerations in addition to relative cost. The Order established guidelines under which the Commission will evaluate the rates under investigation and which carriers may use in developing rates. To give carriers and interested parties an opportunity to consider whether the rates under investigation satisfy the guidelines, the Commission established a further filing schedule for supplemental direct cases, and comments on these submissions.[2]

2. The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) have filed a motion requesting that we authorize the filing of further pleadings in this investigation. US West states that the pleadings submitted to date in this matter contain numerous and substantial misstatements pertaining to US West's position. US West notes that the *Strategic Pricing Order* and the Commission's rules are silent as to further pleadings, but states that a rebuttal round would give US West a fair and adequate opportunity to respond. US West argues that this would benefit not only US West but also the Commission. US West requests permission to file rebuttal comments on February 24, 1989.

3. The Commission did not anticipate a need for further filings in this investigation, and we are not persuaded that the public interest would be served by an additional round of pleadings. We believe that the filings now before the Commission, including direct cases and comments in the continuing investigation as well as pleadings regarding reconsideration of the *Strategic Pricing Order,* constitute a full and complete record. We also believe that our previous grants of extension of time to file direct cases and comments on direct cases, which US West acknowledges, have already imposed significant delay on a proceeding we hope to terminate promptly. Therefore, we are not persuaded that any real purpose would be served by the establishment of yet another round of pleadings in this proceeding.

4. Accordingly, IT IS ORDERED that the motion of the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, FCC 88-321, released Dec. 1, 1988 *(Strategic Pricing Order).*

[2] After two Orders extending the filing dates in that matter, supplemental direct cases were filed on January 10, 1989, and comments or oppositions were filed on January 31, 1989. Investigation of Special Access Tariffs of Local Exchange Carriers, Motions To Extend Time, CC Docket No. 85-166, Phase II, Part 1, Order, DA 88-2003, released Dec. 29, 1988; Order, DA 89-80, released Jan. 27, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION
and SATELLITE BUSINESS SYSTEMS
Complainants,

v. File No. E-88-43

DIVERSIFIED TEL-COMM, INC.,
a Florida Corporation, d/b/a BIZ-TEL,
Defendant.

ORDER

Adopted: May 18, 1989; Released: May 25, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On February 12, 1988, MCI Communications Corporation (MCI) and Satellite Business Systems (SBS) (together Complainants) filed the above-captioned complaint against Diversified Tel-Comm, Inc., d/b/a Biz-Tel (Biz-Tel), an interexchange carrier and customer of complainants. MCI and SBS alleged non-compliance by the defendant with certain SBS tariff clauses. Biz-Tel denied such allegations and moved to dismiss the complaint, claiming that the dispute was already more properly before the Florida state courts.

2. Biz-Tel noted that on March 7, 1987, it brought a civil suit against MCI and SBS in the Circuit Court of Florida, which was subsequently removed to the United States District Court, Southern District of Florida. The complaint contained a number of complex telecommunications issues and on August 10, 1988, the federal court referred them to the Commission under primary jurisdiction.

3. Since that time, with the assistance of the Enforcement Division, the parties have conducted negotiations aimed at resolving the dispute. These negotiations have proven successful and on April 18, 1989, as part of a joint stipulation of dismissal by the federal court in Florida, the court vacated its referral order. On May 3, 1989, complainants moved to dismiss their formal complaint pending before the Bureau, representing the concurrence of Biz-Tel in this action. Since there is no longer a controversy between the parties, we find it is in the public interest to grant the motion.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motion to dismiss the above-captioned complaint IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GIMEX TELECOMMUNICATIONS, INCORPORATED — File No. I-T-C-88-184

Application for authority to resell international switched voice services, telex and telegram services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 18, 1989; Released: May 25, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 2, 1988 and supplemented by letters of January 29, and March 14, 1989 by Gimex Telecommunications, Inc. (GIMEX), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the international switched voice services of AT&T and MCI for the provision of facsimile service and to resell the international telex and telegram services of ITT World Communications Inc. (ITTWC) and Western Union Telegraph Company (WUTC) for the provision of telex and telegram services, respectively, between the U.S. and various overseas points.[1] The application was placed on public notice on August 17, 1988. No comments were received. GIMEX is a corporation organized under the laws of the Republic of the Philippines and authorized to do business in the state of New York.[2]

2. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[3] We find that the market will support additional carriers and that the added competition will be in the public interest.[4]

3. The majority of recent international resale applications granted by the Commission have involved entities seeking authority to provide international switched voice services through the resale of the international switched voice services of existing international carriers. The subject application differs from those applications in that the applicant does not seek authority to resell international switched voice services to provide international switched voice service but, to provide facsimile, a non-voice service.[5]

4. We shall limit our grant of authority for GIMEX to provide international facsimile service by resale of the international switched voice services of AT&T and MCI to the points specified. In recent decisions authorizing entities to provide international switched voice service on a common carrier basis by the resale of switched voice services of existing U.S. carriers, we have granted the applicants authority to provide switched voice service by resale to all of the points currently or hereafter listed in the international switched voice service tariffs of the carrier or carriers whose services are being resold. However, we would note that where the service being provided by a resale carrier is the same as that being resold, there is likely to be little, if any, effect on the foreign correspondent of the U.S. carrier whose service is being resold.

5. For example, a telephone call from the United States to another country provided by a carrier reselling the switched voice service of AT&T or other U.S. carrier is not likely to produce operational or economic effects on the foreign correspondent that differ from those that would occur if the U.S. customer placed the call directly with the U.S. carrier whose service is being resold. Under such circumstances, there would appear to be little or no need for such a U.S. resale carrier to obtain its own operating agreements with the foreign correspondent of the U.S. carriers whose services are being resold. Because of this factor and the fact that the reselling carrier is bound by the terms and conditions of the tariffs of the carriers whose services are being resold, we retain sufficient control over the resold voice service by means of our control over the authorizations and tariffs of the carriers whose services are being resold.

6. The resale of one international service, such as switched voice service, to provide a different international service, such as facsimile service, as is the case in this application, could well present a different situation. In such a case, additional action or different equipment may be required on the part of the underlying U.S. carrier's foreign correspondent. Consequently, it is possible that U.S. resale carriers which resell one international service of an underlying U.S. carrier to provide a different international service may be required to obtain operating agreements or other instruments of authorization by the foreign correspondent or other authorities in some countries.[6]

7. We would also note that in its *International Competitive Carrier* decision, the Commission found that each foreign country constituted a separate geographical market.[7] The Commission indicated that this finding was based primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country.[8] The Commission further found that non-dominant carriers should be required to obtain an initial Section 214 certificate to provide a given service product to a country.[9] Because U.S. resale carriers which provide international services different from the international services being resold may need to obtain operating agreements or other forms of authority from the correspondents or other authorities in the countries where the service will be provided, we believe it is appropriate that such resale carriers be granted initial Section 214 certifications to each country (geographical market) for each service product in accordance with the procedure set forth in the Commission's *International Competitive Carrier* decision.[10]

8. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international telex, telegram and facsimile services by GIMEX.

9. Accordingly, IT IS ORDERED that application File No. I-T-C-88-184 IS GRANTED, and GIMEX is authorized to provide international facsimile service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 and MCI's Tariff

F.C.C. No. 1 between the U.S. and those points listed in the Appendix. GIMEX is also authorized to resell the international telex and telegram services set forth in Western Union Telegraph Company's Tariffs F.C.C. Nos. 283 and 285 and ITT Worldcom's Tariff F.C.C. No. 12 between the U.S. and the points listed in the Appendix.

10. Nothing in this authorization should be construed as authorizing the transmission of money. The transmission of money is not considered to be a common carrier service.

11. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

12. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

13. IT IS FURTHER ORDERED that the applicant shall file quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries listed in the Appendix individually within 90 days from the end of each calendar quarter.

14. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1988).

15. This order is issued under Section 0.291 of the Commission's rules and is effective upon its release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Argentina
Bolivia
Brazil
Chile
Colombia
Costa Rica
Ecuador
El Salvador
Dominican Republic
Guatemala
Honduras
Mexico
Panama
Paraguay
Peru
Philippines
Uruguay
Venezuela

FOOTNOTES

[1] In an order released October 8, 1987, the Chief, Common Carrier Bureau pursuant to delegated authority, authorized the merger of Western Union Telegraph Company with ITT World Communications Inc. to form the post-merger company of Western Union Corporation. *See* 2 FCC Rcd 6063 (1987). The tariffs are still maintained in the names of the companies in their pre-merger form, and we will refer to them as such herein.

[2] Consistent with the Commission's International Competitive Carrier proceeding, we will treat GIMEX as a dominant carrier since it is organized under the laws of the Republic of the Philippines and serves as an agent for Philippines Long Distance Telephone Company (PLDT). *See* International Competitive Carrier Policies, 102 F.C.C.2d 812 (1985); *recon. denied* 60 R.R. 2d 1435 (1986).

[3] *See* Teltec Saving Communications Co., Mimeo No. 3548, n.2 (released April 4, 1986).

[4] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

[5] As noted herein, GIMEX also requests authority to resell the telex and telegram services of ITTWC and WUTC, respectively, to provide telex and telegram services.

[6] For example, in a Memorandum, Opinion and Order, File No. I-T-C-84-081, (released July 3, 1984), the Commission, by delegated authority, granted Instafax International, Inc. (Instafax) authority to provide digital facsimile services to Hong Kong by resale of AT&T's International Message Telecommunications Service. The Order stated that Instafax indicated that it had conducted preliminary discussions with Cable and Wireless (Hong Kong) Ltd., a prospective foreign correspondent in Hong Kong. On July 12, 1984, Instafax filed, pursuant to the provisions of Section 43.51 of the Commission's Rules, 47 C.F.R. Section 43.51, copies of: a Business Registration Certificate issued by the Government of Hong Kong; a Public Non-Exclusive Telecommunications Service License granted by the Office of the Postmaster General of Hong Kong; and an operating agreement between Instafax and Cable and Wireless (Hong Kong) Ltd.

[7] International Competitive Carrier Policies, 102 FCC 2d 812 (1985). Order on Reconsideration, 60 RR 2d 1435 (1986).

[8] *Id.* at 828.

[9] *Id.* at 844.

[10] Because the applicant is reselling services rather than acquiring specific facilities, it need not file the circuit addition reports required by Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH CENTRAL BELL TELEPHONE COMPANY AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

Plan for Comparably Efficient Interconnection for Gateway Services

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1989; Released: May 25, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 20, 1988, pursuant to the requirements of the *Computer III* proceeding,[1] BellSouth filed a Comparably Efficient Interconnection (CEI) plan (the Plan) for the provision of gateway services. It filed an amendment to the Plan (the Amendment) on November 2, 1988, and a further amendment to the Plan (the Further Amendment) on March 30, 1989.[2] The *Phase I Order* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an integrated basis prior to its implementation of Open Network Architecture (ONA) to submit a service-specific CEI plan. The CEI plan must meet specific CEI parameters, as well as other requirements pertaining to other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[3] On November 17, 1988, the Commission adopted the *BOC ONA Order*, which partially approved all of the BOCs' ONA plans, but required that the BOCs submit and the Commission approve a number of amendments before the structural separation requirements would be removed generally for any BOC's enhanced service operations.[4] In this Order, acting pursuant to our delegated authority, we approve the Plan as amended,[5] subject to the conditions discussed below.[6]

II. SERVICE DESCRIPTION

A. *Positions of the Parties*

2. BellSouth states that its gateway service will allow end users to find and reach local and national information services via their existing local exchange access network.[7] The gateway will provide: (1) on-line directions to help users access various information services; (2) listings of information service providers (ISPs);[8] (3) flexible billing options for ISPs; (4) network security features to encourage casual use; and (5) storage capacity for ISP offerings.[9] A gateway user will access the gateway service through a modem and a local exchange loop by dialing a seven-digit local telephone number assigned from an NXX dedicated for the use of enhanced services.[10] The end office that serves the user will route such calls to a tandem switch.[11]

3. BellSouth's circuit switched network will provide calling number identification and called number identification to the gateway processor, which will use this information to identify the user and to provide billing capability for the ISP whose service is accessed. BellSouth plans to employ common channel signaling (CCS) to provide a service called Bulk Calling Line Identification (BCLID) as a means of delivering calling number identification.[12] The network will route the call via dedicated access lines to a "protocol-agile" packet assembler/disassembler (PAP), which will convert the call from an asynchronous to an X.25 protocol, and on to the gateway processor over BellSouth's Public Packet Switched Network (PPSN). Upon a user's selection of an ISP from the gateway menu, the PPSN will route the call to the selected ISP or to an IXC.[13] When the user and the gateway are connected, the gateway will provide a welcome screen, and ask the user to select a further course of action either from a list or directory of available services and options or by searching key words.[14] After a user selects the particular information service desired, the gateway will route the user directly to the selected ISP or to an interexchange carrier, while also monitoring the status of the call.[15]

4. The gateway will also provide electronic mail and computer storage capacity for ISPs. BellSouth states that its gateway will provide computer capacity in which information can be stored for later retrieval. The availability of such storage facilities at the gateway level, according to BellSouth, will make communication more efficient by moving information closer to the end user, thus reducing transmission costs. BellSouth notes that it will have no control over the content of the information associated with these features.[16]

5. ANPA argues generally that BellSouth's description of its proposed gateway services is impermissibly vague. More specifically, ANPA requests details on BellSouth's computer storage offering and assurance that it will be provided in a nondiscriminatory fashion, as well as more information on BellSouth's proposed electronic mail offering.[17] In its reply, BellSouth argues that it has complied with the Commission's requirement to provide a "short general description" of these enhanced services,[18] but also provides additional information about the CEI arrangements for these services.[19]

Discussion

6. A CEI plan must describe a BOC's enhanced service offerings in order to demonstrate the utility to competitors of the basic service offerings that will underlie a proposed enhanced service, as an assurance that CEI to such basic offerings will be available to other ESPs. This description should be complete enough to allow us and others to understand the usefulness of the basic services described by the BOC for its own enhanced services and those of other ESPs. BellSouth's general description of its proposed gateway, electronic mail, and computer storage services, as amended, satisfies that purpose.[20]

III. COMPLIANCE ISSUES

1. *Proposed CEI Arrangements*

a. *Positions of the Parties*

7. According to the Plan, BellSouth will provide CEI to competing ESPs by unbundling from other services all of the basic network capabilities that its gateway uses. BellSouth will associate those basic services with specific rate elements in its CEI tariffs.[21] The Amendment states that BellSouth will not require gateway service providers to obtain all of their network services from tariff sections available only to ESPs.[22] Thus, ESPs will be able to continue to use and purchase any existing tariffed services. According to BellSouth, such existing services include: (1) various business exchange lines, (2) Centrex services, (3) 800 Access, (4) 900 Access, (5) PBX trunks, (6) direct inward dial, (7) foreign exchange, and (8) dedicated services.[23]

8. The Amendment supplements BellSouth's description of CEI for the electronic mail and computer storage features of its gateway service.[24] BellSouth states that its electronic mail service will be connected to the gateway processor, and accessed through the gateway by end users, in the same manner as the services of any other ISP on the gateway. BellSouth adds that no new or different basic services, other than those enumerated in its illustrative tariff, will be necessary for such connection. Those services, BellSouth says, will be available to all local exchange customers under the same terms, rates, and conditions.[25] BellSouth states that its computer storage facilities also will be connected to the gateway, and accessed by end users, in the same way as any other ISP facilities. ISPs subscribing to BellSouth's computer storage service will be listed on the gateway, which will route calls to the ISP that a user selects. BellSouth reiterates that its provision of computer storage facilities will not require any basic service capabilities that are not listed in the Plan.[26]

b. *Discussion*

9. The Amendment emphasizes that neither the electronic mail nor the computer storage feature will use basic network capabilities other than those found in the illustrative tariff filed with the Plan. However, the Further Amendment, which replaces MDSSC with the BCLID service, does not specify the underlying basic CEI services that will be necessary for ESPs that desire to provide either electronic mail or computer storage services. Because a major purpose of the CEI plans is to inform us and the public of the basic services that will be available in a nondiscriminatory manner to competing ESPs, we require BellSouth to file an informational amendment within 21 days of the release of this order, describing in detail the underlying basic services that will be used in providing the electronic mail and computer storage features.[27]

2. *CEI Parameters* [28]

a. *Interface Functionality*

(1). *Positions of the Parties*

10. BellSouth asserts that it will make available to other ESPs standardized hardware and software interfaces able to support transmission, switching, and signaling functions identical to those used by in its own gateway service, and further specifies that its gateway and those of other ESPs will actually use identical technical interconnections, with standard hardware, standard software translation, and standard main distributing frame cross connections.[29]

11. ANPA argues that we should require BellSouth to show how it will comply with the requirement to make available standardized hardware and software interfaces, and that we should require that information and technical specifications relating to the gateway-to-central-office and gateway-to-ISP interfaces are included within the required network information disclosures.[30]

(2) *Discussion*

12. The Plan states that both the BellSouth gateway and competitors' offerings will interconnect to the network through identical technical interconnections using standard hardware, software translations, and main distributing frame cross connections. We also note that, according to the Plan, all services underlying BellSouth's gateway operation will be available in generally available tariffs. Our examination of the sample tariffs provided with the Plan and the amendments indicates that the CEI services described therein are based on standard business lines and PBX trunks, which have well-known interfaces. Based on these factors, and given BellSouth's continuing network disclosure obligations, we find that BellSouth's explanation of its treatment of interface functionalities satisfies this parameter.

b. *CEI Availability*

(1) *Positions of the Parties*

13. The Plan proposes to make BellSouth's CEI offerings available in the same locations and on the same dates for other ESPs as for itself. BellSouth's specific deployment of gateway services will be based on analyses of market, economic, and technical criteria. The Plan also states that BellSouth will provide a reasonable time prior to offering its enhanced service to the public for other ESPs to test new CEI facilities and services with their enhanced service offerings.[31]

14. ANPA argues that BellSouth should be required to specify the time it considers "reasonable" prior to offering its enhanced service to the public for other ESPs to test their services, to allow competitors to comment on whether the time will meet their needs. ANPA also states that BellSouth should be required to describe in more detail which "market, economic, and technical criteria" will be employed and how they will be applied.[32] Telenet asserts that we should require BellSouth to specify its geographic deployment intentions.[33] BellSouth replies that it will initially offer its gateway services and corresponding CEI facilities in Atlanta. BellSouth adds that it will notify other ESPs of the opportunity to use the CEI facilities to test their enhanced service offerings at least 60 days prior

to BellSouth's offering of gateway services to the public.[34] In replacing its proposed interim MDSSC service with BCLID service, BellSouth states that it has scheduled deployment of CCS capability in the Atlanta area in the third quarter of 1989, and that BCLID will be available in the Atlanta area in November of 1989.[35]

(2) *Discussion*

15. We find that BellSouth's clarifications in its reply and further amendment adequately respond to ANPA's and Telenet's concerns about CEI availability. Accordingly, we find that BellSouth satisfies this parameter.[36]

c. *Minimization of Transmission Costs and Recipients of CEI*

16. BellSouth's Plan, Reply, and Amendment repeat proposals and arguments regarding this parameter that we summarized in the *BellSouth VMS Order*.[37] Commenters' arguments questioning BellSouth's attempts to satisfy this parameter also restate arguments noted in that order.[38] We find, as we did in the *BellSouth VMS Order*, that BellSouth's method of addressing these CEI parameters, as modified in the Amendment, satisfies the minimization of transmission costs and recipients of CEI requirements.[39]

IV. ORDERING CLAUSES

17. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 5(d), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 155(d), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and Sections 0.91(h), and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h), 0.291, BellSouth's CEI Plan for CEI for Gateway Services IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX

PARTY FILING CEI PLAN

BellSouth Corp., South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth)

PARTIES FILING COMMENTS ON CEI PLAN

ADAPSO

American Newspaper Publishers Assn. (ANPA)

American Telephone and Telegraph Company (AT&T)

Information Industry Assn. (IIA)

MCI Telecommunication Corp. (MCI)

Prodigy Services Company (Prodigy)

Telenet Communications Corp. (Telenet)

Tymnet-McDonnell Douglas Network Systems Company (Tymnet)

PARTIES FILING REPLIES TO COMMENTS ON CEI PLAN

BellSouth

Coalition of Open Network Architecture Parties (CONAP)

Association of Data Communications Users, California Bankers Clearing House Assn., Commission of Corporate Telecommunications Users, Mastercard Int'l. Inc., New York Clearing House Association, and Visa U.S.A., Inc. (ONA Users' Group)

PARTY FILING AMENDMENT TO CEI PLAN

BellSouth

PARTIES FILING COMMENTS ON AMENDMENT TO CEI PLAN

MCI

Prodigy

Telenet

PARTIES FILING REPLIES TO COMMENTS ON AMENDMENT TO CEI PLAN

BellSouth

Southwestern Bell Telephone Company (SWBT)

PARTY FILING FURTHER AMENDMENT TO CEI PLAN

BellSouth

PARTY FILING REPLY TO FURTHER AMENDMENT TO CEI PLAN

BellSouth

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] A list of commenters on the Plan and the Amendments appears in Appendix A. We use the abbreviations in that appendix throughout this order.

[3] *Phase I Order*, 104 FCC 2d at 1020. AT&T and the BOCs also must satisfy the cost allocation requirements of our *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See* Separation of Costs of Regulated Telephone Service from Costs of

Nonregulated Activities, 2 FCC Rcd 1298 (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Recon Order*), *petitions for further recon. pending.*

[4] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, *Memorandum Opinion and Order*, FCC 88-381 (released Dec. 22, 1988).

[5] We do not discuss arguments raised in the comments that have been raised numerous times in other proceedings and that we have already resolved. In particular, parties made no comments, or repeated or referenced arguments made in other CEI proceedings, regarding BellSouth's treatment of the CPNI, nondiscrimination reporting, network disclosure and cost allocation requirements. Based on our examination of the Plan and Amendment regarding these safeguards, we approve BellSouth's treatment of them. In addition, arguments regarding BellSouth's unbundling, CEI pricing, and tariffing approaches were previously raised and resolved in our prior BellSouth CEI order. *See* BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, *Memorandum Opinion and Order*, 3 FCC Rcd 7284 (1988) (*BellSouth VMS Order*) at 7290-91, paras. 61-74. Therefore, we do not address these issues in this order.

[6] Unless we take action to the contrary within 14 days after BellSouth submits the informational amendments required in para. 9, *infra*, the Plan shall be deemed approved. In addition, if BellSouth desires to offer gateway services or CEI for gateway services under any conditions other than those approved in this order, it must either amend its Plan or file a new one.

[7] Plan at 3.

[8] BellSouth states that for purposes of the Plan, BellSouth uses the term "ISPs" to mean providers of databases or interactive information services that may be accessed through the gateway service of BellSouth or a competing provider. BellSouth uses the term "enhanced service providers" (ESPs) to mean providers of competing gateway services. Plan at 2 n. 3.

[9] Plan at 3.

[10] *Id.* at 3-4.

[11] *Id.* at 7.

[12] Further Amendment at 1-2. In the Further Amendment, BellSouth modified the method by which it will deliver calling number information to its own unseparated gateway operations and to other customers, including ESPs. BellSouth originally stated in the Plan that the network would deliver "automatic number identification" (ANI) to the gateway processor. BellSouth notes that it used the term "ANI" imprecisely in the Plan. According to BellSouth, although the term "ANI" refers to a specific form of calling number information, *e.g.*, trunk-side delivery of the calling party's "billing number", "ANI" is also used loosely to refer to multiple types of calling number information. BellSouth's reference to ANI in the Plan was in this latter context. Further Amendment at 2 n.2.

As originally described in the Plan, the network would convert the customer's calling number information from a standard in-band multi-frequency format to an out-of-band data stream format, which BellSouth refers to as multifrequency-to-data-stream signaling conversion (MDSSC). Plan at 7. However, BellSouth also noted that once CCS was deployed, such an internetworking change in format for this information would not be necessary. *Id.* at n. 6. The Further Amendment's BCLID proposal eliminates the need for the MDSSC function.

The Further Amendment adds that, until deployment of BCLID, BellSouth will provide gateway services on an integrated basis by purchasing existing tariffed services and using personal identification numbers (PINs) to identify customers, just as other ESPs do today. Further Amendment at 6 n. 10. BellSouth states that use of PINs with existing tariffed services will not interfere with BellSouth's or other ESP's ability to provide gateway services or any associated electronic mail or computer storage capabilities. *Id.*

[13] *Id.*

[14] *Id.* at 4.

[15] *Id.*

[16] *Id.* at 5-6.

[17] ANPA Comments at 3-4.

[18] BellSouth Reply at 4.

[19] *See infra* paras. 7-8.

[20] We also approve BellSouth's description of its new approach that replaces MDSSC during the interim period until BCLID is deployed. While we are satisfied with the method of using existing tariffed services and PIN numbers until BCLID is available, we reiterate that BellSouth's nondiscrimination obligations remain in effect during this interim period.

[21] Plan at 6-7. BellSouth modified its tariff proposals in the Amendment.

[22] Amendment at 4.

[23] The Further Amendment notes that all classes of local exchange subscribers will have the option of obtaining the BCLID service feature from the appropriate section of BellSouth's general state tariffs. However, BellSouth states that it will require customers subscribing to BCLID to use the two-way measured transport with which it is associated in its illustrative tariff. All ESPs, including BellSouth's gateway operations, will retain the option of continuing to purchase any existing tariffed service. No parties filed comments on BellSouth's Further Amendment.

[24] Amendment at 7-9.

[25] *Id.* at 7-8.

[26] *Id.* at 9. ANPA requests more assurance of nondiscriminatory access to the gateway, storage, and electronic mail services (as opposed to the access to the underlying basic services). BellSouth replies that ANPA's concerns regarding nondiscriminatory availability of the gateway service to ISPs are unfounded, since it will not discriminate in the provision of gateway services underlying basic services to other gateway providers. It also notes that CEI is only required for the underlying basic services that are available to other gateway providers.

[27] BellSouth has adequately replied to ANPA's concerns summarized at note 26. *See generally* The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services, *Memorandum Opinion and Order*, 3 FCC Rcd 6045, 6046, para. 11 (1988) (*Bell Atlantic Gateway Order*).

[28] Parties made no comments on, raised no substantive objections to, or only repeated or referenced arguments made in other CEI proceedings regarding BellSouth's treatment of the following parameters: unbundling; installation, maintenance, and repair; end user access; resale; and technical characteristics. Based on our examination of the Plan and the Amendment regarding these parameters, we approve BellSouth's treatment of them. *See generally BellSouth VMS Order*, 3 FCC Rcd 7284; The Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Voice Messaging Services, *Memorandum Opinion and Order*, 3 FCC Rcd 5772 (1988) (*Bell Atlantic* VMS *Order*); Southwestern Bell Telephone Company Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Services, 3 FCC Rcd 6912 (1988) (SWBT VMS *Order*).

[29] Plan at 8.

[30] ANPA Comments at 5. In its Comments, Telenet argues that we should require more information on BellSouth's proposed MDSSC service regarding the type of interface that would be required by an ESP wishing to use this feature. Telenet Comments at 13-14. However, since the MDSSC feature has been removed from the Plan pursuant to the Further Amendment, on which Telenet had no comment, we do not address this argument.

[31] Plan at 10 & n.8.

[32] ANPA Comments at 6-7.

[33] Telenet Comments at 15.

[34] BellSouth Reply at 11-12.

[35] Further Amendment at 3-4 & n.7.

[36] If BellSouth decides to deploy its gateway service elsewhere, it must update its Plan before such deployment to specify the additional locations.

[37] *Compare Plan* at 12 and Amendment at 5 n.5 and BellSouth Reply at 12 *with BellSouth VMS Order*, 3 FCC Rcd at 7287, paras. 36-37 (minimization of transmission costs); *compare* Plan at 11 and BellSouth Reply at 13-16 *and* Amendment at 4 n.4, 4-6 *with BellSouth VMS Order* at 7288-90, paras. 45-46, 55-56, 57.

[38] *Compare* MCI Comments at 10 *and* ADAPSO Comments at 6-7 *with BellSouth VMS Order* at 7287-88, paras. 38-39 (minimization of transmission costs); *compare* IIA Comments at 3-4 *and* MCI Comments at 8-9 *and* Tymnet Comments at 8 *and* Telenet Comments at 10-12 *and* Prodigy Comments at 14-15 *and* AT&T Comments at 2-3 *and* ANPA Comments at 7-8 *with BellSouth VMS Order* at 7288-90, paras. 47-54, 58-59 (recipients of CEI).

[39] *Cf. BellSouth VMS Order* at 7288, paras. 42-43 (minimization of transmission costs); *cf. BellSouth VMS Order* at 7290, para. 60 (recipients of CEI).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-113

In the Matter of

Amendment of Section 94.65(e) of the Commission's Rules to Rechannelize the 2450-2483.5 MHz Band. RM-6205

NOTICE OF PROPOSED RULE MAKING

Adopted: May 10, 1989; Released: May 25, 1989

By the Commission:

I. INTRODUCTION

1. On December 10, 1987, the Harris Corporation - Farinon Division (Harris) filed a Petition for Rule Making concerning the 2450 - 2483.5 MHz band available to the Private Operational-Fixed Microwave Service (OFS).[1] By this *Notice of Proposed Rule Making* (*Notice*), we are proposing a new channeling plan for this band that is based on 625 kilohertz channels. Our proposed channeling plan would also permit licensees to combine or "stack" adjacent channels to obtain greater bandwidths. This action is taken to promote more efficient use of the spectrum.

II. BACKGROUND

2. Part 94 provides frequencies intended to satisfy the the needs of private entities for point-to-point and point-to-multipoint microwave communications. These stations are not open to public correspondence and are generally operated by and for the sole use of those persons or agencies eligible to operate their own radiocommunication facilities.[2] Prior to 1985, OFS licensees had access to the frequency band extending from 2450 MHz to 2500 MHz. This 50 megahertz band contained thirty channel pairs with each channel 800 kilohertz wide. The associated transmit and receive channels of a given channel pair were separated by 24.4 megahertz. In 1985, however, the upper 16.5 megahertz of this band (*i.e.*, 2483.5 -2500 MHz) were reallocated to the newly created Radiodetermination Satellite Service (RDSS).[3] OFS continues to have access to the remaining portion of the band; namely, 2450 - 2483.5 MHz. The reallocation, however, eliminated the upper channel of a large number of channel pairs, thus leaving a large number of channels unusable for two-way duplex operations, which is the predominant use of the band. We recognized this fact during the reallocation decision and stated that a future rule making would be initiated to address the issue.[4] In its petition, Harris stated that it is supplying a vehicle for initiating that projected rule making.[5]

III. PETITION AND COMMENTS

3. Given this background, Harris submitted its petition to rechannel the 2450 MHz OFS frequency band. Harris states that this action is desirable, if not necessary, because the existing rules effectively render 16 megahertz out of a total 33.5 megahertz as unassignable, because of a lack of paired channels, unless the Commission performs a case-by-case analysis.[6] Harris states that a new channeling plan in this band would simplify the Commission's processing of applications by eliminating the case-by-case analysis and, also, would reduce uncertainty among OFS users and equipment manufacturers as to which frequencies can be used in the band.[7]

4. The Harris Petition also emphasizes that any new channeling plan must accommodate digital transmissions. Harris believes that digital technology is quickly becoming the preferred mode of operation in OFS and that its use should be encouraged because it is highly efficient.[8] Harris states that to better accommodate digital transmissions, channels in this band need to be wider than the present 800 kilohertz and therefore urges us to create 1250 kilohertz channels and to allow bandwidths up to 2500 kilohertz on a case-by-case basis.[9] Harris recognizes that this increase in channel width would result in fewer available channels, but believes that the increase in efficiency derived from using digital transmissions would offset this disadvantage.[10]

5. Harris also proposes a reduction in the minimum separation between paired channels from the present 24.4 megahertz to 22 megahertz. Harris points out that the partial reallocation of this band makes a reduction in the required separation inevitable and that 22 megahertz is the minimum separation that can be accommodated without major increases in the cost of equipment.[11] Finally, Harris requests that we include a 10 megahertz channel in the band for emergency restoration, maintenance bypass, and other temporary fixed purposes. Harris proposes that this channel overlay its proposed channeling plan. Harris states that such a channel is needed by OFS licensees operating on 5 and 10 megahertz channels in the 1850 - 1990 MHz (1850 MHz) band.[12]

6. Comments to the Harris Petition were submitted by the Utilities Telecommunications Council (UTC) and the American Petroleum Institute (API). UTC states that although it supports the initiation of this proceeding, it is uncertain as to the appropriateness of the specific proposals in the Harris Petition.[13] API also supports the general thrust of the petition but suggests certain modifications to the plan proposed by Harris. While API agrees with Harris that digital technology should be encouraged, it believes that the Harris Petition does not provide licensees with sufficient flexibility.[14] Rather, API believes that the Commission should adopt a system that allows for varying bandwidths; namely, 625, 1250, and 2500 kilohertz. This approach, according to API, would provide for digital transmissions and also allow for more available channels in areas of heavy congestion.[15]

7. To demonstrate the flexibility of its approach, API discusses how members of the oil and gas industries have experienced a shortage of channels in this band for offshore operations and states that 625 kilohertz channels would be extremely useful in the Gulf of Mexico to maximize the number of channels available for assignment.[16] Conversely, according to API, the oil and gas

industries would be more inclined to use the wider channels for digital transmissions for inland operations, where frequency congestion is not nearly as severe.[17]

8. Concerning other aspects of the Harris Petition, API points out that the proposed reduction in the standard separation between paired channels from 24.4 to 22 megahertz would necessitate adopting grandfathering provisions for existing equipment.[18] On this matter, API notes that the 2450 MHz band permits the licensing of temporary fixed stations, *i.e.*, stations operating from fixed locations for only a specific period of time, allowing licensees to relocate their stations within a licensed geographical area. API urges that we maintain flexibility for licensees using existing equipment by adopting a clause that specifically permits licensees to relocate within their licensed geographical area without losing grandfathered status.[19] Finally, API does not support the creation of a 10 megahertz restoration channel in this band. API believes that the proposed restoration channel would significantly add to interference problems and, because of the provisions for temporary fixed stations in this band, lead to frequency coordination difficulties.[20]

9. In its reply comments, Harris indicates that it could support some modifications to its proposed channeling plan consistent with the comments of API. Harris therefore proposes amending its plan by adding eight 625 kilohertz channel pairs.[21] Harris reiterates its support, however, for 1250 kilohertz channels to accommodate digital transmissions. Finally, Harris continues to urge adoption of the 10 megahertz restoration channel, stating that such a channel would be useful in helping licensees with extensive analog networks to maintain service during future transitions to digital technology.[22]

IV. DISCUSSION

10. In deciding upon specific technical characteristics of a channeling plan we usually face a balancing of competing requirements. The record before us indicates a need to accommodate digital transmissions by adopting wider bandwidths and to maximize the number of available channels by limiting the bandwidth of each channel. Although these objectives appear to be in conflict, they both represent ways in which to achieve an efficient and effective use of this spectrum, albeit from different perspectives. These perspectives, as API discussed, assume varying levels of importance in different parts of the country.[23] Faced with this situation, we are proposing a plan that provides licensees the flexibility to acquire the amount of spectrum that best suits their individual needs. We propose to adopt a plan based on 625 kilohertz channels and further propose to allow applicants/ licensees to "stack" adjacent channels upon a proper showing of need. We initially propose to limit applicants/licensees to a maximum of 2500 kilohertz, or four adjacent channels, but we do request comments on whether some other maximum level, if any, should be adopted. We believe that this approach satisfies the dual requirements of accommodating digital technology and creating the maximum number of available channels for areas that are extremely congested.

11. Turning to the issue of the required separation between channels, we agree with Harris that the reallocation of the upper portion of this band necessitates some reduction in the current standard of 24.4 megahertz. While Harris recommends that the new separation standard be 22 megahertz, we note that this figure would leave over 10 megahertz of unpaired spectrum in the center portion of this band. Although this unpaired spectrum could be made available for either simplex or one-way operations, we do not believe that a sufficient justification has been presented to use the band in this manner. One of our major goals in this proceeding is to maximize the number of *paired* channels in this band, not to create unpaired channels that have limited uses. By reducing the standard separation, however, we also reduce the amount of unpaired spectrum. The optimum separation would be one that maximizes the number of available 625 kilohertz channels and minimizes the amount of unpaired spectrum. We therefore propose a separation standard of 17.25 megahertz which creates 26 channel pairs and leaves only 1 megahertz of unpaired spectrum.

12. We are mindful, however, of the concerns expressed by Harris that the reduction in the standard separation could increase the cost of equipment. We do solicit comments on this issue and specifically on how our proposed separation of 17.25 megahertz will affect costs and equipment availability. If the comments clearly show that this standard imposes severe hardships, we would consider an appropriate adjustment in the separation. Commenters are reminded, however, that equipment costs are only one issue and that consideration must also be given to spectrum efficiency. Regardless of the channel separation ultimately decided upon, commenters are invited to suggest how to make the most efficient use of any unpaired spectrum remaining in this band.

13. Turning to the issue of grandfathering, we agree with the position of API that existing equipment should be grandfathered and that a temporary fixed station using grandfathered equipment should be allowed to relocate to new operating locations within its authorized area of operation. Because the nature of temporary fixed stations is to relocate quite often, grandfathering existing equipment for use at present locations only would not provide any meaningful relief. We do solicit comments, however, on whether it would be appropriate to sunset these provisions. We could, for example, require all equipment operating in the band to conform to any new technical standards adopted in this proceeding after five years. Commenters favoring this latter approach should indicate what time frame would be appropriate.

14. The final issue before us is whether we should propose a 10 megahertz channel for emergency, by-pass, or restoration purposes. Harris believes that this channel would be extremely useful for licensees operating in the 1850 MHz band that convert their operations to digital technology. On the other hand, API questions the need for such a channel. While the availability of a "back-up" channel has some merit, we hesitate to make such a decision based on the limited information before us. We therefore solicit additional comments on the need for such a channel in this band. We also solicit comments on whether a better approach to implementing this channel would be to allow applicants/licensees to "stack" adjacent 625 kilohertz channels to obtain wider bandwidths than previously proposed.[24] We could, for example, allow applicants/licensees to stack channels to obtain up to 10 megahertz of spectrum on a temporary basis for the purposes expressed by Harris. This approach has the advantage of allowing additional flexibility and is consistent

with our proposed channeling plan. Again, we seek comments on this issue as well as all proposals and issues contained in this *Notice*.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action.

15. The Commission is proposing these rule changes to implement a new channeling plan in the 2450 - 2483.5 MHz band. The channeling plan for the 2450 - 2500 MHz band was rendered inefficient when the upper 16.5 megahertz of that band was reallocated to the Radiodetermination Satellite Service. The purpose of these rule changes is to increase the efficient utilization of the spectrum.

B. Legal Basis.

16. Sections 4(i), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping and other compliance requirements.

17. No new requirements will be imposed upon licensees because of this action.

D. Federal rules which overlap, duplicate or conflict with this rule.

18. None.

E. Description, potential impact, and number of small entities involved.

19. Many small entities could be positively affected by these proposals because more efficient utilization of the spectrum should be the result. That would allow more radio systems to operate in a given area without harmful interference. Although the technical proposals contained herein would render existing equipment incompatible with the proposed new standards, the Commission has proposed liberal grandfathering provisions for existing equipment. Comments are sought on whether these provisions should apply indefinitely or should expire after some specified period. In either case, the Commission will attempt to minimize any negative impact on existing licensees.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives.

20. None.

VI. PAPERWORK REDUCTION ACT STATEMENT

21. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

VII. PROCEDURAL MATTERS

22. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion to the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

24. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Interested persons may file comments on or before **July 17, 1989** , and reply comments on or before **August 1, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

25. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 94 is proposed to be amended as follows:

1. The authority citation for Part 94 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 94.65 is proposed to be amended by revising paragraph (e) to read as follows:

§ 94.65 Frequencies.

* * * * *

(e) *2450 - 2500 MHz:* This band is shared with base, mobile, and radiolocation stations, and is subject to no protection from interference from Industrial, Scientific and Medical devices operating on 2450 MHz.

625 kHz bandwidth.

Paired Frequencies

Transmit (or receive)	Receive (or transmit)
2450.3125	2467.5625
2450.9375	2468.1875
2451.5625	2468.8125
2452.1875	2469.4375
2452.8125	2470.0625
2453.4375	2470.6875
2454.0625	2471.3125
2454.6875	2471.9375
2455.3125	2472.5625
2455.9375	2473.1875
2456.5625	2473.8125
2457.1875	2474.4375
2457.8125	2475.0625
2458.4375	2475.6875
2459.0625	2476.3125
2459.6875	2476.9375
2460.3125	2477.5625
2460.9375	2478.1875
2461.5625	2478.8125
2462.1875	2479.4375
2462.8125	2480.0625
2463.4375	2480.6875
2464.0625	2481.3125
2464.6875	2481.9375
2465.3125	2482.5625
2465.9375	2483.1875

Applicants may request up to four adjacent channel pairs in order to receive a maximum of 2500 kHz.

* * * * *

FOOTNOTES

[1] The Private Operational-Fixed Microwave Service is governed by Part 94 of the Commission's Rules, 47 C.F.R. § 94.1 *et seq.*

[2] *See* 47 C.F.R. § 94.3. *C.f.*, First Report and Order, PR Docket No. 83-426, 57 RR 2d 1486 (1985) (Authorizing leasing of system capacity by QFS licensees to Part 94 eligibles).

[3] Report and Order, Gen Docket No. 84-689, 58 RR 2d 1416 (1985).

[4] *Id.* at para. 21.

[5] Harris Petition at 2.

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.* at 6.

[11] *Id.* at 3.

[12] *Id.* at 7.

[13] Comments of UTC at 3.

[14] Comments of API at 7.

[15] *Id.* at 8.

[16] *Id.*

[17] *Id.* at 9.

[18] *Id.*

[19] *Id.* at 10.

[20] *Id.* at 11.

[21] Reply Comments of Harris at 2.

[22] *Id.* at 4.

[23] *See* para 7 *infra.*

[24] *See* para 10 *infra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AUTOMATIC DATA
PROCESSING, INC.
Complainant,

v. File No. E-87-56

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Acting Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: May 15, 1989; Released: May 26, 1989

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on April 28, 1989, by Automatic Data Processing, Inc. (ADP), and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reasons set forth below, the joint motion is granted.

2. This proceeding was initiated by a formal complaint filed by ADP against AT&T on April 22, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied the allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT & T*, DA-88-462 (released April 13, 1988). Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties have reached a settlement that resolves the matters in controversy.

3. On the basis of the statements contained in the parties' joint motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaint filed by Automatic Data Processing, Inc. and American Telephone and Telegraph Company IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HOUSTON NETWORK, INC., Assignor — File No. I-T-C-89-068-AL

and

AXCESS TELECOMMUNICATIONS, INC., Assignee

Application for assignment

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1989; Released: May 26, 1989

By the Chief, International Facilities Division:

1. On February 27, 1989, Houston Network Inc. (HNI) filed the above-captioned application for consent to assign its Section 214 international authorization (File No. I-T-C-88-077) to Axcess Telecommunications, Inc. (Axcess), pursuant to Section 214 of the Communications Act of 1934, and Section 63 of the Commission's Rules.[1] The application was placed on public notice on March 1, 1989. No comments were received.[2]

2. HNI, a Texas Corporation, currently provides both domestic and international resale services. HNI's customers include the consulate of a foreign government, the Houston branch of a Canadian bank, and various energy and chemical companies among its 2000 subscribers. Axcess is a newly formed, wholly-owned subsidiary of Williams Telecommunications Group, Inc. (WTG). WTG, through its subsidiaries, WTG-Central Inc. and WTG-West, Inc., provides long haul telecommunications services to most of the Fortune 1000, and to most of the largest providers of switched interstate service. WTG's current nationwide fiber optic network, with an additional 800 miles of digital microwave system, extends approximately 6,400 miles.

3. HNI and Axcess contend that the proposed assignment serves the public interest. They state that authorization of the assignment will enable Axcess to provide services from the United States to international points its parent WTG does not presently served. By stepping into HNI's shoes, Axcess proposes to offer resold international switched voice service to Canada, Mexico, and the points listed in its applicable tariffs.

DISCUSSION

4. We find that proposed assignment will not substantially impact HNI's management or service. Although Axcess is a newly formed corporation, its parent WTG, through its subsidiaries WTG-Central, Inc. and WTG-West, Inc., holds 40 authorizations in the Domestic Public Fixed Radio Service. Axcess, as a subsidiary of WTG, will be able to expand its services as a result of the proposed transaction, with no lessening of service, thus benefiting its present subscribers.

5. We must also address the issue of whether the proposed transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or the assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be"substantially to lessen competition, or to tend to create a monopoly."[3] Under Section 11 of that statute, this Commission is empowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[4] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act " are satisfied when the Commission seriously considers the anti-trust consequences of a proposal and weighs those consequences with other public interest factors."[5] Our independent review of the material filed does not reveal, nor do we foresee, any significant threat to competition as a result of the porposed transaction. HNI is a non-dominant carrier in the international market, while Axcess's parent's subsidiaries, WTG-Central, Inc. and WTG-West, Inc., are also non-dominant carriers in the domestic market. While the instant transaction will further expand WTG's markets from the domestic to the international sector, it hardly presents a situation whereby WTG's subsidiaries emerge as dominant carriers in either the domestic or international market places.

6. In view of the foregoing, we find that the public convenience and necessity will be served by approving the above-captioned application for consent to assignment of HNI to Axcess.

7. Accordingly, IT IS ORDERED that application File No. I-T-C-89-068-AL for consent to assignment of Houston Network Inc. to Axcess Telecommunications, Inc. IS GRANTED.

8. IT IS FURTHER ORDERED that Temporary Authority (TAO-1505) Is Hereby Terminated.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] On March 29, 1989, HNI Acquisition Corporation changed its name to Axcess Telecommunications, Inc.

[2] On February 24, 1989, the Chief, International Facilities Division granted temporary authority (TAO-1505) to assign HNI's Section 214 authorization to HNI Acquisition without prejudice to the Commission's ultimate decision in this matter.

[3] 15 U.S.C. §18.

[4] 15 U.S.C. §21.

[5] United States v. FCC, 652 F.2d, 72, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE INTERNATIONAL, INCORPORATED, Transferor

File No. I-T-C-89-069-TC

and

FG VENTURES, INCORPORATED Transferee

Application for authority to transfer control of Telesphere Network, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1989; Released: May 26, 1989

By the Chief, International Facilities Division:

1. On February 21, 1989, the above-captioned application was filed for consent to transfer of control of Telesphere Network, Inc., (Telesphere) to FG Ventures, Inc. The application was placed on public notice on March 1, 1989. No comments were received.

2. Telesphere is currently authorized by the Commission to provide international switched voice services on a resale basis, (File No. I-T-C-88-088), and serves more than 6,000 long distance customers in over 30 states. Telesphere is a wholly owned subsidiary of Telesphere International, Inc. (Telesphere Int.). Telesphere Int., utilizing a nationwide fiber optic network, is a leading provider of long distance and enhanced communication services, particularly to the hotel and hospital industries.

3. FG Ventures, Inc. (FGV) is a newly-organized holding group owned by Francesco Galesi, a New York Investor. Mr. Galesi is the sole director and president of FGV. FGV owns or operates businesses in the fields of real estate (New York and accross the country), warehouseing and distribution (New York), and manufacturing (Pennsylvania). Mr. Galesi also, has the Galesi Group which owns Telus Communications, one of the largest providers of long distance telecommunications in Florida.

4. The proposed transaction contemplates the placement of $15 million in debentures of Telesphere with FGV. The 10 year debentures are exchangeable for the common stock of Telesphere Int. Telesphere Int. will ask its stockholders to approve a charter amendment giving debenture holders voting rights of one vote for each share of common stock issuable in exchange for the debentures. If the stockholders approve the amendment, the debentures will bear an interest-rate of 14% and will be exchangeable, at $.77 per share, for approximately 19.4 million shares or 53% of the post-exchange shares outstanding, subject to additional provisions. If the amendemdent is not approved, the interest rate will increase to 18% and the debentures would be exchangeable for approximately 17.2 million outstanding shares. Therefore, by owning 53% of Telesphere Int.'s outstanding shares, FGV will have the ability to control Telesphere.

DISCUSSION

5. We find that the proposed transfer of control detailed in the application will not entail substantial changes in Telesphere's structure, management, or service. The company will remain intact, retaining its operating facilities, personnel, officers and directors. The infusion of the addition capital generated by the placement of $15 million in debentures will enable Telesphere to maintain the cash flow necessary for its on going operations and to obtain a needed accounting and management information system.

6. We must also address the issue of whether the proposed transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[1] Under Section 11 of that statute the Commission is impowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[2] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[3] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both Telesphere and Telus Communications are non-dominant carriers and the proposed transaction does not appear to adversely impact their respective marketplaces.

7. In view of the foregoing, we find that the public convenience and necessity will be served by approving the above-captioned application for transfer of control of Telesphere to FGV.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-89-069-TC for transfer of control of Telesphere Network, Inc. to FG Ventures, Inc. IS GRANTED.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] 15 U.S.C. §18.

[2] 15 U.S.C. §21.

[3] United States v. FCC 652 F.2d 72, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

GEOSTAR POSITIONING CORPORATION — File No. 2670-DSE-MISC-88

For Authority to Operate a Transmission Link in the 4/6 GHz Frequency Bands to Provide Radiodetermination Satellite Service to Receive-Only User Terminals

ORDER AND AUTHORIZATION

Adopted: May 8, 1989; **Released: May 25, 1989**

By the Commission:

I. INTRODUCTION

1. Geostar Positioning Corporation (Geostar) requests authority to operate a transmission link in the 4/6 GHz bands, using facilities leased from GTE Spacenet Corporation (GTE Spacenet), to provide radiodetermination satellite service (RDSS) to Geostar's receive-only user terminals. Geostar intends to use this link until its dedicated RDSS satellites are operational. The American Telephone and Telegraph Company (AT&T) filed comments on Geostar's request. Geostar and GTE Spacenet filed replies. For the reasons discussed below, we grant Geostar's application subject to certain conditions.

II. BACKGROUND

2. In 1986, the Commission granted Geostar authority to construct and launch three operational RDSS satellites.[1] The Geostar system is to be a two-way data transmission service providing position location information and ancillary messages directly to customers using frequencies allocated for RDSS.[2] Geostar's three dedicated RDSS satellites are currrently under construction.[3]

3. Geostar is also developing a service that it will offer to customers until its dedicated system is fully operational. Currently, Geostar is providing a one-way service using an RDSS package that was placed on GTE Spacenet's Spacenet III domestic fixed-satellite.[4] This provides an inbound link from Geostar's licensed transmitting units to Geostar's central earth station.[5] This information is then relayed to customers' operations centers.[6]

4. To accompany this inbound transmission link, Geostar now seeks to establish an outbound link from a central earth station to receive-only user units. This would allow individual customers to use receiving as well as transmitting antennas, permitting two-way capability.[7] To accomplish this, Geostar proposes to use existing fixed-satellite facilites operating in the 5925-6425 MHz and 3700-4200 MHz (C-band) frequency bands. Specifically, Geostar intends to use GTE Spacenet's licensed tracking, telemetry and control (TT&C) earth station facility in Woodbine, Maryland to transmit to Geostar's receive-only user units via the Spacenet III satellite. In a letter filed in support of Geostar's application, GTE Spacenet states that the transmission from the Woodbine earth station carrying the Geostar signal does not exceed the licensed parameters for the earth station and does not produce additional terrestrial interference above that for which the signal has been coordinated.[8] GTE Spacenet also states that it has reached a coordination agreement with AT&T, whose Telstar 302 satellite is located adjacent to Spacenet III, and who had raised concerns regarding potential intersatellite interference.[9]

III. DISCUSSION

A. Frequency Allocation Matters

5. Geostar's proposed outbound transmission link from the GTE Spacenet fixed-earth station to Spacenet III to the user units is in the C-band. Specifically, the Earth-to-space transmission is in the 5925-6425 MHz band and the space-to-Earth transmission is in the 3700-4200 MHz band. These bands are allocated domestically to the fixed-satellite service and fixed-terrestrial service on a shared basis.[10] There is no allocation for RDSS in these bands. That portion of the proposed link from the fixed earth station to the satellite presents no frequency allocation questions because the transmission is characterized as a fixed-satellite transmission and thus is an authorized use of the frequency band. However, the portion of the link from the satellite to Geostar's mobile RDSS units is is not an authorized use. Nevertheless, we conclude that the public interest would be served by allowing C-band transmissions from a fixed-satellite to Geostar's RDSS units if those transmissions are not likely to cause harmful interference into authorized services.

6. In general, use of the radiocommunication frequencies in the United States must be in accordance with the Table of Frequency Allocations contained in Section 2.106 of the Commission's rules.[11] We have, however, permitted non-conforming uses in certain circumstances. For example, we recently allowed mobile satellite service to be provided via fixed-satellites in the 11.7-12.2 GHz space-to-Earth frequency band although there is no specific allocation for a mobile satellite service in that band.[12] In that case, the companion 14.0-14.5 GHz Earth-to-space band was allocated to mobile satellite service on a secondary basis. We stated that we saw no reason to preclude a two-way service "when a downlink transmission from a fixed-satellite appears identical regardless of whether it is being received by fixed or mobile terminals."[13]

7. Here, Geostar is currently authorized to operate transmit-only RDSS user terminals. It now seeks to operate C-band receive-only terminals to accompany the transmitting terminals. This will provide two-way capability until Geostar's dedicated RDSS satellites are in-orbit. If Geostar's RDSS operations conform to operations in the fixed-satellite service, we would see no reason to preclude this two-way service while Geostar's dedicated system is being built. Although GTE Spacenet would be required to cease operations immediately if its transmissions interfered with any licensed facility, we seek to avoid disruptions to existing and future services. We will therefore permit the proposed RDSS operations only if there is

little potential for interference into any service authorized to use that band under the Table of Frequency Allocations. The RDSS operator will also have to accept any interference from any of these services.

B. Technical Matters

8. Accordingly, we must next determine whether Geostar's proposed RDSS operations are likely to cause harmful interference to either the fixed-satellite or terrestrial services that are authorized to use that spectrum. Geostar states that the RDSS outbound signal is a 1.2288 Mbps bi-phase shift keying (BPSK) carrier that has a power spectral density distribution less than that of a typical domestic FM-TV carrier at saturated transponder level. It asserts that its RDSS signal is similar to a video signal and will cause no more interference than FM-TV carriers commonly used in the domestic fixed-satellite service. GTE Spacenet represents that transmissions from the Woodbine station will continue to conform to the station's licensed technical parameters and that the Geostar signal does not create any additional potential for interference into terrestrial stations. No terrestrial operators have objected to Geostar's proposal. In addition, GTE Spacenet states that intersatellite coordination has been completed, citing its agreement with AT&T.

9. Based upon these representations and our technical analysis of the RDSS signal, we believe that the potential for harmful interference is not significant enough to bar grant of Geostar's application with its accompanying public benefits. Thus, we authorize the proposed operations. However, to ensure that RDSS operations can be terminated immediately in the case of interference and to allow us to monitor these operations, we impose certain conditions on Geostar as discussed below.

C. Licensing Matters

10. Geostar seeks to operate up to 20,000 technically identical receive-only RDSS terminals and suggests that because the Commisssion no longer requires licenses for receive-only domestic fixed-satellite earth stations[14], a license for Geostar's earth stations may not be required. We believe, however, that a license is necessary and grant Geostar a blanket authorization to construct and operate its proposed receive-only terminals.

11. Our experience with domestic fixed receive-only earth stations has permitted us to discontinue mandatory licensing for these stations in the fixed-satellite service frequency bands.[15] However, this treatment has not been extended to other receive-only earth stations, where different considerations are involved. For example, we continue to require licenses for earth stations that receive signals from non-U.S. satellites.[16] Here, Geostar is proposing a non-conforming use of the 3700-4200 MHz frequency band that has the potential to cause harmful interference into authorized services in that band. To permit a non-conforming use, we must grant a waiver of the U.S. Table of Frequency Allocations. Moreover, given our lack of experience with such operations, we believe it advisable to monitor the transmissions for interference. Thus, we must either modify the license of the space segment licensee to permit RDSS operations, issue licenses for the service provider's receiving terminals, or do both. We conclude that it would be more efficient to license the service provider.

12. First, requiring the space station licensee to request the necessary modifications would be unduly burdensome. This would require a licensee to have primary responsibility for the operations of every entity accessing its satellite, even where it has sold or leased transponders and the non-conforming use is being made by its customer's customer. Even if the space station licensee is also the licensee of the transmitting earth station, as is the case here, the RDSS transmission is similar to a fixed-satellite video signal and may not be easily detected as a non-conforming use. While the space or earth station licensee would be required to cease operations immediately if any interference is caused to other licensed facilities, we believe it more expedient to place the responsibility for obtaining authority to provide the RDSS service on the service provider itself. This will ensure that all required authorizations are obtained with a minimal amount of burden placed on Commission licensees.

13. Moreover, we believe it necessary to continue to monitor non-conforming uses after they are authorized. For example, we find it advisable to maintain information on the number of receiving terminals being used in order to determine the prevalence of non-conforming services. In addition, we think it prudent to require the non-conforming licensee to notify us of any allegations of interference and their resolution. This information will aid us in making reasoned decisions on specific applications as well as in making any general allocation decisions. We believe it is more appropriate to place the burden of providing us with this information on the service provider itself rather than on the entity that has merely leased or sold transmitting capacity to the service provider.

14. We therefore conclude that Geostar is required to obtain a license to construct and operate its receive-only RDSS units. In accordance with our policy of issuing blanket licenses for large numbers of technically identical small antennas where individual coordination of each station is not required,[17] we grant Geostar a blanket license to cover 20,000 units. Requiring individual licenses for each of the antennas would be costly and burdensome to both the licensee and the Commission. We require Geostar, as a non-conforming user, to maintain a point of contact who can immediately remedy any interference problems or arrange to terminate operations if necessary. In addition, we require Geostar to maintain logs of all alleged incidences of interference, the stations involved, and the outcome of the incident.

IV. CONCLUSION AND ORDERING CLAUSES

15. We find that Geostar is qualified to hold earth station licenses and that grant of its application will serve the public interest, convenience and necessity. By authorizing Geostar to provide its proposed service to the public while its dedicated system is being built, we hope to allow two-way radiodetermination satellite service to be made available in a timely manner. We emphasize, however, that implementation of the outbound RDSS link is at Geostar's risk. Should this link cause interference into fixed-satellite or terrestrial stations operating in the C-band, Geostar and GTE Spacenet will be required to cease transmissions immediately. In addition, Geostar will be required to accept interference from any conforming user.

16. Accordingly, IT IS ORDERED that Application File No. 2670-DSE-MISC-88 IS GRANTED and Geostar Positioning Corporation IS AUTHORIZED to construct and operate a network of up to 20,000 receive-only mobile terminals in the radiodetermination satellite service in accordance with the technical parameters and formal conditions specified in the attached instrument of authorization and subject to the following additional conditions:

a) No harmful interference shall be caused into any authorized service that has superior status, either domestically or internationally, in the 3700-4200 MHz frequency band (*see* 47 C.F.R. § 2.106), and Geostar Positioning Corporation and GTE Spacenet Corporation shall immediately cease mobile operations upon notification of interference into any of these services;

b) Geostar Positioning Corporation, as a non-conforming user of the frequency band, must accept any interference from any service authorized to use the 3700-4200 MHz band;

c) Geostar Positioning Corporation is authorized to operate in the 3700-4200 MHz band until its full dedicated radiodetermination satellite system is launched and operational. *See Geostar Corporation*, Mimeo No. 6144 (released August 7, 1987). At that time, this authorization will automatically expire;

d) Geostar Positioning Corporation shall maintain a point of contact who can arrange to remedy any interference problems immediately or to terminate operations if necessary. Geostar Positioning Corporation shall submit the name and telephone number of the contact within 30 days of the release of this order;

e) Geostar Positioning Corporation shall annually file with the Commission the number of receive-only radiodetermination satellite service units constructed within that year;

f) Geostar Positioning Corporation shall maintain a log recording all incidents where its operations are accused of causing harmful interference. The log shall record the nature of each incident, the parties involved and the outcome. The log shall be maintained for a five year period for each incident. Geostar Positioning Corporation shall notify the Commission of any complaints of interference within 14 days of its receiving a complaint. Geostar Positioning Corporation shall also inform the Commission of the outcome of the incident within 14 days of its resolution.

17. Geostar Positioning Corporation is afforded thirty days from the date of release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Geostar Corporation, Mimeo No. 6144 (released August 7, 1986). The Commission's rules define "radiodetermination" as the determination of position, or the obtaining of information relating to position, by means of the propogation properties of radio waves. *See* 47 C.F.R. § 2.1.

[2] The dedicated system will work in the following manner: Information from individual mobile user units will be transmitted to the Geostar satellites in the 1610-1626.5 MHz frequency band. The satellite will retransmit these messages in the 5117-5183 MHz band to Geostar's central earth station facility for distribution to customers' operations centers via terrestrial or satellite circuits. Outbound messages from customers' operations centers will be carried to Geostar's central earth station, transmitted to the satellite in the 6525-6541.5 MHz band, and retransmitted to the mobile user units in the 2483-2500 MHz frequency band. *See* Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, First Report and Order, 58 Rad. Reg. 2d (P&F) 1416 (1985), *recon.* 104 FCC 2d 637 (1986).

[3] *See* Letter to Secretary, FCC from President, Geostar Corporation (August 4, 1988).

[4] *See* GTE Spacenet Corporation, 1 FCC Rcd 1163 (Com. Car. Bur. 1986). An identical package was placed on GSTAR III, which was launched in September 1988 but has not yet reached geostationary orbit. *See* GTE Spacenet Corporation, Mimeo No. 5175 (Com. Car. Bur. released June 16,1986).

[5] *See* Geostar Corporation, 2 FCC Rcd 1184 (Com. Car. Bur. 1987), in which the Bureau issued Geostar blanket licenses for 10,000 transmitting units.

[6] This link operates in the following manner: A message from a Geostar user unit is uplinked in the 1610-1626.5 MHz band frequency band, converted to an 11.7-12.2 GHz (Ku-band) fixed-satellite signal, and downlinked to Geostar's central station.

[7] Geostar had been authorized to place a transmit/receive RDSS payload on GSTAR IV that would have provided two-way service to users (*see* GTE Spacenet Corporation, 2 FCC Rcd 5312 (Com. Car. Bur. 1987)), but decided not to proceed with those plans. *See* Application for Digital Land Mobile Satellite System filed by Geostar Messaging Corporation on June 16, 1988.

[8] *See* letter from Counsel, GTE Spacenet Corporation to Secretary, FCC (November 10, 1988).

[9] *Id.*

[10] In Region 2, the bands are also allocated to the terrestrial mobile (except aeronautical) service. *See* 47 C.F.R. § 2.106.

[11] *See* 47 C.F.R. § 2.102(a). Under the International Radio Regulations, administrations may assign frequencies not in conformance with the International Table of Frequency Allocations provided that the assignment is conditioned upon the non-conforming user not causing harmful interference to services operating in accordance with the Table. Radio Regulation 342.

[12] Qualcomm, Inc., 4 FCC Rcd 1543 (1989).

[13] *Id.* at para. 12.

[14] Deregulation of Domestic Receive-Only Satellite Earth Stations, 74 FCC 2d 205 (1979).

[15] The voluntary licensing program established in 1979 was limited to domestic fixed-satellite receive-only earth stations; we specifically stated that "transmissions in this service must be between specified fixed points." *Id.* at 214.

[16] *Id.* at 220.

[17] *See* Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands. Mimeo No. 3588 (released April 9, 1986). *See also* Qualcomm, Inc., 4 FCC Rcd 1543 (1989); Licensing of Space and Earth Stations in the Radiodetermination Satellite Service, 104 FCC 2d 650 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ANTHONY PARED d/b/a I.B.N. — File No. 20157-CD-P/L-01-86, as amended. File No. 21468-CD-P/L-01-87

For a one-way paging facility to operate on 35.42 MHz in the Public Mobile Service at Guaynabo, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1989; Released: May 30, 1989

By the Acting Chief, Mobile Services Division:

I. BACKGROUND

1. On October 15, 1986, Anthony Pared d/b/a I.B.N. (I.B.N.) filed an application for a public mobile service license to operate on frequency 35.42 MHz at Guaynabo, Puerto Rico. On November 24, 1986, Telecom Plus Transmission Services, Inc. (Telecom), a provider of existing paging services in the area I.B.N. proposes to serve, filed a petition to deny the captioned application. No responsive pleadings were filed. However, in response to Telecom's petition, I.B.N. filed an amendment to its application on December 23, 1986.[1]

2. Both the original application and the amendment thereto, in response to Item 10 of Form 401, Schedule A, indicated that the applicant is an "unincorporated association" (Box C). The amendment noted, in response to Item 3, that the legal name of the applicant is Anthony Pared, rather than I.B.N. Moreover, Exhibit B1-10 of the amended application stated that Mr. Pared is "the applicant and real party in interest." However, Exhibit B1-9, which is included in both the initial application and the amendment, stated that the proposed paging system "will be owned and operated by a minority group composed of women, Blacks and Hispanics."

II. REAL PARTY IN INTEREST

3. Telecom argues that the I.B.N. application should be dismissed as defective for failure to comply with Section 22.13(a)(1) of the Commission's Rules. Specifically, it contends, the application does not disclose fully the real party or parties in interest that are engaged in the public mobile service, as required by Section 22.13(a)(1). According to Telecom, "[o]ther than the bare assertion that I.B.N. is an unincorporated association, no information is provided as to the real parties in interest to I.B.N. This information is critical to assessing I.B.N.'s and its undisclosed members' legal qualifications." (Telecom Petition to Deny at 3.)

4. In reviewing the original application, amendment and relevant exhibits, the staff of the Mobile Services Division (MSD) found that it was unable to determine whether Anthony Pared is the sole owner of the applicant, or whether the applicant is also owned by members of the group referred to in Exhibit B1-9. For this reason, the MSD requested Mr. Pared to clarify whether the applicant is an individual or unincorporated association and, if the latter, to disclose all the owners and their respective percentage of ownership. Letter from MSD to Anthony Pared (April 4, 1989).

5. Mr. Pared, responding to our inquiry, stated that the applicant is an individual, not an unincorporated association. Letter from Anthony Pared to MSD (April 17, 1989). He added that, in the amendment to his application, he erroneously marked Box C of Item 10 ("unincorporated association") instead of Box A ("individual"). Moreover, the letter explained that Mr. Pared is the sole owner of the applicant, and that I.B.N. is the name it will be using to market his services. Finally, Mr. Pared's response clarified that the members of the group previously referred to in his application and amendment do not currently own any percentage of I.B.N. According to Mr. Pared, he is "associated with other people in the sense that they work for [him] on a contract basis," but these associates "now hold zero (0) per cent" in the applicant. Letter from Anthony Pared to MSD at page 2 (April 17, 1989).[2]

6. In light of the April 17, 1989 letter clarifying the ownership interests, we find that the I.B.N. applicant has complied with the Commission's Rules governing disclosure of the real party in interest. In particular, we are satisfied that Mr. Pared is the sole owner of the applicant, and that no other person holds an ownership interest in I.B.N. Pursuant to Section 22.13(a)(1), an applicant need only disclose those subsidiaries, affiliates and persons holding financial interests in Part 22 licensees, permittees or applicants. *See generally Jacksonville Cellular Telephone Corporation*, 2 FCC Rcd 6416 (Mob. Serv. Div. 1987); *Cellular One of Terre Haute, Inc.*, 2 FCC Rcd 4752 (Mob. Serv. Div. 1987); *Charleston, WV Celltelco*, 2 FCC Rcd 4286 (Mob. Serv. Div. 1987).

7. After careful review of the application, we find I.B.N. to be financially, legally, technically and otherwise qualified to be a Commission licensee.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, that the application of Anthony Pared d/b/a I.B.N., File No. 20157-CD-P/L-01-86, as amended, File No. 21468-CD-P/L-01-87, Guaynabo, Puerto Rico, IS GRANTED.

9. IT IS FURTHER ORDERED that the Petition to Deny filed by Telecom Plus Transmission Services, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The amended application of Anthony Pared d/b/a I.B.N. was given the file number 21468-CD-P/L-01-87. *See Public Notice*, Report No. PMS 87-16 (January 14, 1987), corrected by *Public Notice*, Report No. PMS 87-22 (February 25, 1987).

[2] Mr. Pared also indicated that he had not previously disclosed the ownership interests of the members of the minority group because he intended that no other person would hold five per cent or more interest in the applicant. We take this opportunity to emphasize that, except for corporate ownership interests of less than five per cent, a public mobile service applicant must reveal all of its ownership interests. Thus, we remind Mr. Pared that, in the case of an unincorporated association, ownership interests of less than five per cent must also be disclosed in an application. *See News Release*, Mimeo No. 366 (November 3, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ad Hoc Telecommunications Users Committee, Committee of Corporate Telecommunications Users, Telenet Communications Corp., and Transaction Service Providers
Applications for Review of the Common Carrier Bureau's Approval of AT&T's Comparably Efficient Interconnection Plan for Transaction Services

Transaction Service Providers
Request for Stay of the Common Carrier Bureau's Approval of AT&T's Comparably Efficient Interconnection Plan for Transaction Services

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1989; Released: May 30, 1989

By the Commission:

I. INTRODUCTION

1. In June 1988, four parties filed applications for review and one party filed a request for stay[1] of the Common Carrier Bureau's order conditionally approving AT&T's Comparably Efficient Interconnection (CEI) Plan (the plan) for Transaction Services.[2] The party seeking a stay of the *Bureau Order* filed a supplemental request for stay on July 5, 1988. AT&T filed oppositions to the applications for review, the stay request, and the supplemental stay request.

2. AT&T's opponents in this proceeding argue that we should reject the plan, or require revisions to it, because: (1) AT&T should apply tariffed rates for the interoffice transmission channels that AT&T provides to its Accunet Packet Service (APS); [3] (2) AT&T has not offered adequate safeguards to protect the confidentiality of customer proprietary network information (CPNI);[4] and (3) AT&T should take additional steps to minimize the transmission costs incurred by competing enhanced service providers (ESPs) by allowing them to collocate their equipment on AT&T premises, providing noncollocated ESPs with access links at the same prices charged to AT&T's collocated enhanced services,[5] or offering dial-up access to APS and Dataphone Digital Service (DDS).[6] We address each of those arguments below, deny the applications for review, and dismiss as moot the stay request and supplemental stay request.

II. THE BUREAU ORDER

3. The *Bureau Order* approved AT&T's plan for the collocated[7] provision of its Transaction Services offering, an enhanced service that allows merchants at points of sale to interact with the computers used by merchant credit processors to process sales, credit, debit, or check transactions, or other transactions requiring authorization. The offering includes protocol processing. Transaction Services is an existing business that AT&T has been operating on a noncollocated basis pursuant to the *AT & T Limited Waiver Order*.[8] The Bureau conditioned its approval of the plan on AT&T's compliance with our requirements concerning the separation of regulated from nonregulated costs,[9] the treatment of CPNI,[10] and the preparation and filing of nondiscrimination reports.[11]

III. PRICING OF INTEROFFICE TRANSMISSION CHANNELS FOR APS

A. *Background*

4. The *Phase II Order* determined that protocol processing (such as that occurring in Transaction Services) should continue to be treated as an enhanced service[12] and that, when protocol processing is offered by AT&T or a BOC, the carrier must satisfy specific CEI requirements in order to provide efficient, nondiscriminatory, unbundled access to its basic service facilities necessary for competitors to provide enhanced services that include protocol processing.[13] We specifically directed AT&T to implement these requirements by offering to others, at the same tariffed rates it charges its own enhanced service operations, the digital transmission capabilities that underlie its enhanced services that provide protocol processing.[14] We held that AT&T must take such basic services and facilities that it uses for its own enhanced services at the standard tariffed rates that it charges to others.[15]

5. In contrast, because of the BOCs' control over local basic service facilities, we subjected their protocol processing operations to more detailed requirements than those applied to AT&T,[16] based on the conditions we had applied earlier in the *Asynchronous / X. 25 Waiver Order*.[17] Those conditions include a requirement that the BOCs apply tariffed rates to the interoffice channels they use in the provision of packet service.[18]

6. In the plan, AT&T states that the principal basic service underlying Transaction Services is APS, a basic service that provides a set of packet switching, transmission, and optional features.[19] AT&T proposes that Transaction Services continue subscribing to APS, DDS, voice grade services, and central office connections at the same tariffed rates that Transaction Services and other noncollocated users pay now.[20]

B. *The Bureau Order*

7. The *Bureau Order* approved the plan's proposal that Transaction Services continue subscribing to existing AT&T tariffed services in their present form, including APS.[21] The Bureau rejected arguments by IBM and Telenet that, if AT&T were allowed to treat APS as the basic service underlying Transaction Services, it would improperly obtain the interoffice transmission facilities included in APS at "embedded cost," rather than at the tariffed rates it charges its competitors for equivalent interoffice DDS service. The Bureau refused to require

AT&T to "unbundle" APS into two of its component parts --interoffice channels and packet switching -- and offer those components separately at prices which, if summed together, would equal the price that AT&T charges for APS.[22] The *Bureau Order* held that AT&T satisfied our requirement that its enhanced, protocol-processing services subscribe to underlying basic transmission services at tariffed rates, under the same terms and conditions available to others. The Bureau stated that APS is the principal digital transmission service underlying Transaction Services, and that, under the CEI rules applicable to AT&T, it was entitled to take APS at standard tariffed rates. The Bureau also expressed the view that the different CEI requirements that apply for AT&T and BOC provision of protocol processing indicate that we did not intend to impose on AT&T the type of "transmission-at-tariff" requirement that IBM and Telenet claimed to be necessary for APS.[23]

C. *Positions of the Parties*

8. In its application for review, Telenet argues that AT&T has sufficient dominance over digital transmission services that it has the ability to impose a "price squeeze" upon competing ESPs who must rely upon AT&T for DDS service.[24] To prevent this kind of unfair competition, Telenet says, we should require AT&T not only to charge its enhanced services the full tariffed rates for DDS when they subscribe to that service, but also, if AT&T's enhanced services subscribe to APS, require the rates for APS to reflect full tariffed rates for DDS, which, it contends, is used as a component of AT&T basic packet-switched services like APS.[25] Telenet construes the *Phase II Order* and the *Phase II Reconsideration* as requiring AT&T to apply separate, tariffed rates to interoffice transmission channels in this way.[26] Telenet concedes that, in the *Transmittal 474 Order*,[27] we approved an APS tariff that did not reflect the tariffed rates for the underlying DDS circuits; but it argues that the *Transmittal 474 Order* and related tariff orders are not relevent to this proceeding because those orders did not address AT&T use of APS to offer collocated enhanced services.[28] Finally, Telenet argues that, while APS is a tariffed offering, it is not a general public offering because AT&T is the chief customer for APS[29] and APS has limited utility to customers other than AT&T.[30] This fact is significant, says Telenet, because it undermines the normal assumption that a dominant carrier would not underprice a tariffed basic service used in its own enhanced offerings.[31] In this case, says Telenet, AT&T's enhanced service competitors cannot benefit from the underpricing of APS, because the service they need is not APS but DDS.[32]

9. The AT&T opposition construes the *Phase II Order* as requiring only the Bell Operating Companies (BOCs), not AT&T, to unbundle and offer at tariffed rates the interoffice transmission channels involved in basic packet switched services.[33] AT&T argues that Telenet is seeking the identical relief that Telenet sought, and that we refused to grant, in the APS tariff proceeding.[34]

D. *Discussion*

10. Our recent *AT & T ONA Order* clarified that the *Phase II Order* does not require AT&T to revise its APS rates to reflect the full tariffed rates for DDS when AT&T uses APS as the underlying basic service for an enhanced service offering.[35] We recognized that some language in the *Phase II Order* could conceivably be interpreted as suggesting that we sought to revise the relationship between AT&T's rates for APS and DDS,[36] but noted that the *Phase II Order* as a whole described the requirements for AT&T in terms that are fully consistent with an AT&T decision to use APS as the underlying basic service for its own protocol processing services.[37] We reiterated our *Phase I Reconsideration* finding, adopted on the same day as the *Phase II Order*, that competition in the interexchange markets served by AT&T is sufficiently strong to justify less intrusive CEI/ONA safeguards for AT&T than for the BOCs.[38] We concluded that, to the extent that conditions in the interexchange market have changed since the *Phase II Order* and the *Phase I Reconsideration* were adopted, those conditions have changed in the direction of more competition, both in quantitative and qualitative terms, with other interexchange carriers increasingly capable of providing high quality data transmission channels.[39] For Telenet in particular, we observed that Telenet's parent company, US Sprint, is an obvious potential source of alternatives to AT&T's DDS service.[40]

11. Although the *AT & T ONA Order* involved the CEI safeguards that AT&T proposed for its noncollocated enhanced services, our present CEI requirements apply the same standards to AT&T's collocated enhanced services.[41] The *AT & T ONA Order* specifically approved AT&T's provision of APS to the noncollocated version of Transaction Services,[42] and we do not perceive any circumstances that should alter that analysis for the collocated version of Transaction Services. We therefore deny Telenet's application for review on this issue.

IV. CUSTOMER PROPRIETARY NETWORK INFORMATION

A. *Background*

12. The *Phase I Order* held that AT&T may use CPNI for its enhanced service marketing operations, provided that it establishes procedures to honor any requests from customers that their CPNI be (i) withheld from AT&T enhanced service personnel, or (ii) released to other enhanced service providers.[43] The *Phase II Order* required AT&T to notify its multiline business customers of these rights on an annual basis. The *Phase II Reconsideration* stated that we expected carriers to take special care to protect the CPNI of customers, expecially enhanced service providers, that request restricted treatment of their CPNI.[44] We required AT&T and the BOCs to designate "network services only" personnel or take other steps to handle the provision of basic network services to such customers.[45]

13. The plan proposed to satisfy these requirements by establishing for enhanced services the same CPNI procedures that AT&T applies to customer premises equipment (CPE), namely, that AT&T will provide multiline business customers with annual notification of their right to restrict access to their CPNI by AT&T marketing and sales personnel, and that AT&T will address customer requests for restricted treatment of discrete projects by providing basic service to those operations through its Vendor Liaison Program (VLP), which limits access to CPNI to AT&T basic service network personnel.[46] However, the plan stated that it would not be practical or efficient for AT&T to establish a separate sales group for customers who seek confidential treatment of all of their CPNI. AT&T therefore proposed to respond to requests for gen-

eral CPNI restrictions by instructing its marketing personnel to refrain from all sales efforts for CPE and enhanced services to such customers, except that those personnel could continue to process customer-initiated orders.[47]

B. *The Bureau Order*

14. The *Bureau Order* approved the plan's CPNI proposals on an interim basis, pending review of the AT&T ONA plan. The Bureau stated that this interim approval would automatically become permanent when, and if, we found that AT&T had complied with the CPNI rules for ONA purposes.[48]

C. *Positions of the Parties*

15. CCTU and the TSPs apply for review of the *Bureau Order*, arguing that the plan does not propose adequate measures for safeguarding the confidentiality of CPNI for ESPs who compete with AT&T enhanced services but are dependent on AT&T's basic services network for their underlying transmissions.[49] The TSPs contend, for example, that AT&T can parse the CPNI of a competing transaction services processor to reveal the identity, location, and approximate transaction volume of the processor's largest customers, as well as the products that the processor provides to each customer at any given time.[50] The TSPs argue that the remedy proposed in the plan -- directing AT&T personnel to refrain from selling enhanced services to such customers -- is inadequate, because AT&T ESPs could benefit unfairly from the CPNI of competing ESPs whether or not AT&T sells enhanced services to such ESPs.[51] The TSPs also argue that the Bureau took no steps to prohibit AT&T's enhanced service personnel from viewing, as opposed to using, the CPNI of customers who request confidentiality.[52]

16. On July 15, 1988, and August 25, 1988, after CCTU and the TSPs filed their applications for review, AT&T submitted letters to the Bureau proposing to modify its treatment of CPNI.[53] The *AT & T ONA Order* includes a detailed summary of those filings, which provided for (1) continued enhanced service marketing support for customers seeking across-the-board restrictions on use of their CPNI, through AT&T's existing Carrier Service Center (CSC), (2) administrative measures to prevent AT&T enhanced service personnel from using restricted CPNI to develop services or equipment that compete with the offerings of enhanced service providers that purchase basic services from AT&T, and (3) use of passwords and identification codes to restrict access to the two internal databases used most frequently by AT&T sales personnel.[54]

D. *Discussion*

17. The *AT & T ONA Order* construed the July 15 and August 25 Letters as applying to all AT&T enhanced services and conditioned our approval of AT&T's ONA plan on AT&T's conformance with that interpretation.[55] That order noted that in those letters, together with the CPNI measures described in AT&T's ONA plan, AT&T essentially proposes three measures to restrict customers' CPNI from access by its enhanced service personnel: administrative and disciplinary measures; use of the CSC and VLP; and the use of password/IDs in important CPNI databases.[56] The *AT & T ONA Order* concluded that those measures are an adequate response to our CPNI requirements.[57] We emphasized that these requirements apply to all of the CPNI in AT&T's possession, and that AT&T is under an obligation to ensure that its personnel do not use any of that information improperly.[58] We found that AT&T has demonstrated a good-faith effort to comply with our rules by indicating its intent to establish password protection for restricted CPNI in the databases that are most frequently used by its sales personnel, and by proposing other important safeguards.[59] We recognized that it might not be cost-effective to apply password protection to every AT&T database that might contain some restricted CPNI, and that other less costly measures could achieve the desired results for databases that are generally not accessed by sales personnel and that contain CPNI in fragmented forms that are not very useful for marketing enhanced services.[60] We approved the entire CPNI section of AT&T's plan, as amended by the July 15 and August 25 Letters.[61]

18. As in the case of the tariffing issues discussed above, the CPNI proposals under review in the *AT & T ONA Order* described safeguards that AT&T proposed to implement for its noncollocated enhanced services. However, no party has argued that we should modify the application of our CPNI requirements for purposes of AT&T's collocated Transaction Services offering, and we perceive no reason to do so. We therefore deny the applications for review of this part of AT&T's plan.

V. MINIMIZATION OF TRANSMISSION COSTS

A. *Background*

19. The *Phase I Order* recognized that carriers may reduce or eliminate certain equipment and transmission costs by collocating or integrating enhanced services facilities with their basic network facilities. While we did not impose mandatory collocation requirements on carriers subject to CEI, we did require such carriers to provide others with interconnection facilities that minimize such transmission costs. We required that carrier CEI plans demonstrate the steps the carrier would take to reduce transmission costs for enhanced service competitors. The *Phase I Reconsideration* stated that the requirement that transmission costs be minimized focuses on technological methods, such as multiplexing, which reduce the extent of the local exchange facilities that an ESP requires for access to the carrier's network, rather than pricing for minimizing such costs.[62] We further clarified that a CEI offering that is substantially identical to existing services need not be priced lower than those services simply for CEI purposes. Instead, we encouraged the use of existing basic services in CEI in order to expedite initial CEI development.[63] The *Phase II Reconsideration* clarified that a carrier may satisfy this CEI requirement if the carrier charges itself an access link rate that is the same as that paid by non-collocated enhanced service providers, provided that the access connections in each case are equivalent in technical quality.[64]

B. *Collocation*

1. *The Bureau Order*

20. The Bureau declined to require AT&T to offer physical collocation to competing ESPs because we had already rejected such proposals in the *Phase I Order*.[65] The Bureau also declined to require AT&T to provide

"virtual" collocation, *i.e.*, provide access links to noncollocated, competing ESPs at the same prices that AT&T's collocated ESPs pay, on the ground that AT&T has no control over the transmission facilities, generally owned by LECs, that other ESPs use to access the AT&T basic network.[66] The Bureau approved AT&T's cost-minimization proposals after noting that AT&T, in response to a suggestion from an opposing commenter, had offered a new form of multiplexing that allows competing ESPs to connect multiple voice-grade data transmission nodes to one 56 kilobits-per-second (kbps) access connection. [67]

2. ***Positions of the Parties***

21. AHTUC argues that we should require AT&T to provide virtual collocation because (a) the Bureau has recognized that AT&T is otherwise powerless to minimize the cost of a competitor's access to AT&T basic service facilities via LEC access lines, and (b) we have permitted BOCs to satisfy their cost minimization obligations by charging their own ESPs the same rates that they charge noncollocated ESPs for access.[68] CCTU applies for review on the ground that actual collocation has proven viable, and even profitable, to basic service carriers in other countries and has also been offered by several BOCs.[69] CCTU says we should not reject such a requirement simply because we cannot conclude that it would be the most efficient form of equal access in all situations and for all ESPs.[70] IDCMA supports CCTU's position by arguing that AT&T should be required to provide collocation unless it can show in specific cases that it would be infeasible to do so.[71] The TSPs, in their application for review, contend that the Bureau failed to consider economic implications after the Bureau "noted" TSP-provided evidence that collocation could give AT&T a cost advantage of between 8 and 50 percent over its rivals in the transaction processing industry.[72] Finally, both the TSPs and CCTU argue that allowing AT&T to collocate Transaction Services without requiring that it provide collocation to others would violate the antidiscrimination provision of Title II of the Communications Act (the Act).[73]

22. AT&T counters these arguments by citing earlier orders by this Commission that it says rejected both mandatory physical collocation[74] and mandatory virtual collocation.[75] AT&T questions the magnitude of cost savings that the TSPs claim they would achieve through collocation, arguing that its potential savings would be less than one-third of one cent per transaction, even without taking into account the space and energy that its Transaction Services equipment will use at its basic service locations.[76] AT&T argues that the antidiscrimination provisions of Title II of the Act do not apply because collocation, like the leasing of space for telephone pole attachments or other real estate transactions, is not a communications service.[77] Even if the Act did apply to collocation, says AT&T, collocation could not properly be deemed an unjust or unreasonable basis for discrimination.[78]

3. ***Discussion***

23. We believe that AT&T has made a reasonable and adequate effort to minimize the transmission costs of its competitors with its offer to provide a new form of multiplexing requested by one of the commenters. As noted in the *Bureau Order*, this offering will enable ESPs to aggregate traffic from multiple nodes onto a single high-speed circuit, allowing interexchange transmission at lower unit costs.[79] We decline to require AT&T to provide actual or virtual collocation for the reasons given in the *Phase I Order* and the *Phase I Reconsideration*. [80] The applications for review of this issue essentially request reconsideration of our policies concerning mandatory collocation, but those requests are now untimely,[81] and, in any event, the merits of this issue have been fully addressed in the above-referenced orders.[82] Accordingly, we deny the applications for review on this issue.

C. ***Dial - Up Access to APS and DDS***

1. ***The Bureau Order***

24. The Bureau rejected proposals that it require AT&T to provide dial-up access to APS.[83] APS users must provide their own packet assembly-disassembly devices (PADs),[84] and the Bureau concluded that few customers requiring dial-up access have PADs.[85] The Bureau found that dial-up access to DDS from point-of-sale terminals would be less complex than dial-up service to APS, because the customers would not need to have their own PADS,[86] but it concluded that the record provides little or no reason to believe that there would be sufficient demand to absorb AT&T's cost of providing dial-up access to DDS. The Bureau cited evidence, provided by the TSPs, that dial-up access would be useful only in low-volume areas where competing enhanced service providers cannot justify installing their own dial-up nodes.[87] The *Bureau Order* declined to require dial-up access to APS or DDS.[88]

2. ***Positions of the Parties***

25. AHTUC argues that the Bureau stood the standard of proving economic efficiency "on its head" when it found that commenting parties had failed to establish that dial-up access to APS would not be cost-effective.[89] Instead, says AHTUC, when alternatives for cost minimization are propounded by ESPs, it should be the obligation of AT&T to prove that any particular minimization proposals are grossly inefficient or impossible. Since AT&T has not met this standard of proof, asserts AHTUC, AT&T should be required to accept AHTUC's proposal that it provide dial-up access to APS and DDS.[90]

26. AT&T contends that AHTUC has provided no evidence to support its claim that dial-up access would be economically feasible, and it argues that AT&T should not bear any burden to disprove what has not been proved in the first instance.[91]

3. ***Discussion***

27. While we do not require commenters like AHTUC to assume the entire burden of proving that novel cost-minimization proposals will be economically efficient, we do expect them to provide at least some evidence that such services can be self-supporting. In this case, AHTUC has provided no evidence that AT&T would recoup its costs if it offered dial-up access. Indeed, the TSPs state that dial-up access would provide only limited benefits to AT&T's competitors, which suggests that there would be only limited demand for this service. AHTUC would apparently have us confront the uncertainties of these marketplace issues by requiring AT&T either (a) to prove that any cost-minimization measures proposed by any ESP are "grossly inefficient," or (b) to offer them as services. Because of the speculative nature of AHTUC's

proposal, we decline to impose any such burden on AT&T, and we deny AHTUC's application for review on this issue.

VI. STAY REQUEST

28. The TSPs filed a request for stay and a supplemental request for stay of the *Bureau Order* pending our decision on its application for review. Since we have denied the TSPs' application for review, we dismiss its request for stay and supplemental request for stay as moot.

VII. ORDERING CLAUSES

29. IT IS ORDERED, That the applications for review filed by AHTUC, CCTU, Telenet, and the TSPs ARE DENIED.

30. IT IS FURTHER ORDERED That the request for stay and supplemental request for stay filed by the TSPs ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parties Filing Applications for Review

Ad Hoc Telecommunications Users Committee (AHTUC)

Committee of Corporate Telecommunications Users (CCTU)

Telenet Communications Corp. (Telenet)

Association of Data Communications Users, the California Bankers Clearing House Assn., MasterCard International, Inc., the New York Clearing House Assn., and VISA U.S.A. Inc. (the Transaction Service Providers or TSPs)

Party Filing Request for Stay

TSPs

Party Filing Opposition to Applications for Review

American Telephone and Telegraph Co. (AT&T)

Party Filing Opposition to Request for Stay

AT&T

Party Filing Comments on Applications for Review

Independent Data Communications Manufacturers Assn. (IDCMA)

Party Filing Reply to Comments on Applications for Review

AT&T

Party Filing Supplemental Request for Stay

TSPs

Party Filing Opposition to Supplemental Request for Stay

AT&T

FOOTNOTES

[1] Parties to this proceeding are listed in the attached Appendix. Abbreviations in that Appendix are used throughout this order.

[2] American Telephone & Telegraph Plan for the Provision of Transaction Services, *Memorandum Opinion and Order*, 3 FCC Rcd 2702 (1988) (*Bureau Order); Regulations (Third Computer Inquiry), Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order), modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration), further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration), appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order), modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration), further reconsideration pending*, (pet. for rev. filed Apr. 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[3] Telenet Application at 5-13.

[4] CCTU Application at 15-21; TSP Application at 18-20.

[5] AHTUC Application at 4-16; CCTU Application at 12-14; IDCMA Comments at 2-6; TSP Application at 8-18.

[6] AHTUC Application at 6-13.

[7] This order uses the term "collocated" to describe the provision of an enhanced service using equipment that is located on the same premises with AT&T basic service facilities.

[8] Petition of the American Telephone and Telegraph Company for Limited and Temporary Waiver of 47 C.F.R. Section 64.702 Regarding its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released Nov. 27, 1985), *application for review denied, Phase I Order*, 104 FCC 2d at 1043, n. 220.

[9] *Bureau Order*, 3 FCC Rcd at 2710, *citing* AT&T Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, *Memorandum Opinion and Order*, 3 FCC Rcd 1786 (1988).

[10] *Bureau Order*, 3 FCC Rcd at 2711, para. 80 and n. 180.

[11] *Id.* at 2712, para. 86.

[12] *Phase II Order*, 2 FCC Rcd at 3078, para. 43.

[13] *Id.* at 3080, para. 61.

[14] *Id.* at 3081, para. 63.

[15] *Id.*

[16] *Id.* at 3080-3081, para. 62.

[17] Petition for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 100 FCC 2d 1057 (1985).

[18] *Phase II Order* at 3080-3081, para. 62.

[19] Plan at 8.

[20] *Id.* at 8.

[21] *Bureau Order*, 3 FCC Rcd at 2704, paras. 22-25.

[22] *Id.*

[23] *Id.* at para. 22.

[24] Telenet Application at 12.

[25] *Id.* at 12-13.

[26] Telenet Application at 5-6, 10-11.

[27] AT&T Communications, Inc., Tariff F.C.C. Nos. 4, 9 and 10 (Accunet Packet Service), *Order*, 2 FCC Rcd 588 (1987), *reconsideration* denied, 2 FCC Rcd 5231 (1987).

[28] Telenet Application at 9, *citing Transmittal 474 Order. See also AT&T Communications, Inc., Revisions to Tariff F.C.C. Nos. 260, 266, 268, 270, 273 and 274 (Accunet Packet Service), 101 FCC 2d 144 (1985) (Investigation Order).*

[29] *Id.* at 6-7.

[30] *Id.* at 8.

[31] *Id.*

[32] *Id.*

[33] AT&T Opposition at 15-18.

[34] AT&T Opposition at 19.

[35] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase II, *Memorandum Opinion and Order*, 4 FCC Rcd 2449 (1988) at 2454, paras. 37-40, *appeal pending*, No. 89-1194 (D.C. Cir. filed Mar. 20, 1989). DDS is already "unbundled" from APS in the sense that DDS is available as a stand-alone service.

[36] *AT&T ONA Order* at n. 128, *citing Phase II Order*, 2 FCC Rcd at 3079, para. 49.

[37] AT&T ONA Order at para. 39.

[38] *Id.* at para. 40.

[39] *Id. at n. 129*, citing MCI Tariff F.C.C. No. 1 at 17, 18.1.7, and 34.4-34.4.1 (showing rates and availability of MCI DDS service among 98 cities at 2.4, 4.8, 9.6 and 56 kilobits-per-second (kbps)); US Sprint Tariff F.C.C. No. 5 at 59-60 (1.544 megabits-per-second (mbps) digital data transmission service among 161 cities); US Sprint Product Announcement: "Clearline Digital Fiber Private Line Service" (announcing planned availability of 56 kbps DDS private line service in the third or fourth quarter of 1988); "US Sprint to Broaden Digital Data Offerings: Firm Will Unveil Family of Dedicated Services," Network Services, January 11, 1988, at 1 (describing Sprint's plans to offer DDS services ranging in speed from 2.4 kbps to 64 kbps).

[40] *AT&T ONA Order* at n. 129.

[41] Id. at paras. 28-29. After we issued the notice of proposed Rule Making that initiated the *Computer III* proceeding, the *AT&T Limited Waiver Order* exempted noncollocated AT&T enhanced services from some of the *Computer II* structural separation requirements, subject to certain conditions. Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released Nov. 27, 1985). The Phase I Reconsideration superseded the *AT&T Limited Waiver Order* by requiring that the AT&T ONA plan apply to those noncollocated enhanced services the same nonstructural safeguards that we require for collocated enhanced services offered by AT&T. *Phase I Reconsideration*, 2 FCC Rcd at 3043, para. 53.

[42] The *AT&T ONA Order* expressly applies to Transaction Services. Id. at para. 29.

[43] 104 FCC 2d at 1089-1090, paras. 260-261.

[44] 3 FCC Rcd at 1163, para. 99.

[45] *Id.* We required AT&T and the BOCs to amend their ONA plans to describe the types of information those carriers will treat as CPNI. *Id.* We also adopted five requirements designed to facilitate users' ability to limit access to users' CPNI. Id., 3 FCC Rcd at 1163-1164, paras. 104-109.

[46] Plan at 18.

[47] *Id.*

[48] *Bureau Order*, 3 FCC Rcd at 2711, para79.

[49] CCTU Application at 15-21; TSP Application at 18-20. On July 5, 1988, the TSPs requested leave to supplement their June 10, 1988, stay request and asked us to stay the portion of the Bureau Order approving the plan's CPNI proposals. We describe this filing as the Supplemental Stay Request and waive the relevant filing deadline to include it in the record of this proceeding.

[50] TSP Application at 18.

[51] *Id.* at 19.

[52] *Id.* at 20.

[53] Letter from Francine J. Berry, Vice President and Assistant General Counsel, AT&T, to H. Walker Feaster, Acting Secretary, FCC, July 15, 1988 (July 15 Letter); and Letter from E.C. Fletcher, Division Manager, Federal Regulation Department, AT&T, to H. Walker Feaster, Acting Secretary, FCC, August 25, 1988 (August 25 Letter).

[54] *AT&T ONA Order* at paras. 52-54.

[55] *AT&T ONA Order* at para. 55.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] We noted that AT&T's actions are consistent with the CPNI protections we found to be necessary for the BOCs. *Id.* at n. 172, *citing BOC ONA Order*, at paras. 426-430. The *BOC ONA Order* required each of the BOCs other than NYNEX to implement a password/ID system comparable to that proposed by NYNEX. Id. at para. 430. NYNEX will apply a password/ID system to two of its databases, the same number of databases to which AT&T proposes to apply password/ID protection. NYNEX ONA Plan, Appendix L at 1-3.

[60] *AT&T ONA Plan* at para. 55.

[61] *Id.*

[62] *Phase I Reconsideration*, 2 FCC Rcd at 3068, n. 261.

[63] *Id.*

[64] *Phase II Reconsideration*, 3 FCC Rcd at 1155, paras. 32-34.

[65] *Bureau Order*, 3 FCC Rcd at 2708, para. 56, *citing Phase I Order*, 104 FCC 2d at 1042, paras. 151-153.

[66] *Bureau Order*, 3 FCC Rcd at 2709, para. 57.

[67] *Id.*, 3 FCC Rcd at 2709, para. 61.

[68] AHTUC Application at 16.

[69] CCTU Application at 13.

[70] *Id.* at 12-13. CCTU says that virtual collocation would be an acceptable alternative that would establish a "level playing field." Id. at 14.

[71] IDCMA Comments at 3-4. IDCMA apparently believes that this Commission should conduct administrative hearings, on a case-by-case basis, to determine whether or not AT&T would be justified in denying collocation opportunities to unaffiliated entities at specific locations.

[72] TSP Application at 15. The TSPs filed a request for stay of the portion of the Bureau Order declining to require AT&T to offer collocation.

[73] *Id.* at 11-13; CCTU Application at 9-10.

[74] AT&T Opposition at 6-7, *citing Bureau Order*, 3 FCC Rcd at 2708, para. 56, *citing Phase I Order*, 104 FCC 2d at 1042, paras. 151-153.

[75] AT&T Opposition at 7-8, citing Phase I Order, 104 FCC 2d at , para. 172; Phase I Reconsideration, FCC Rcd at , paras. 126, 128.

[76] *Id.* at 10 n. *** Based on a claim by the TSPs that transaction processors typically charge 2 to 6 cents per transaction, the maximum savings per transaction from collocation that AT&T claims ($0.003) would imply a percentage cost savings of between 5 and 15 percent. *See id.* and TSP Application for Review at 14.

[77] AT&T Opposition at 9.

[78] *Id.* at 9-10.

[79] *Bureau Order,* 3 FCC Rcd at 2709, para. 61.

[80] The *Phase I Order* declined to require actual collocation. *Id.,* 104 FCC 2d at 1038, paras. 152-153; id. at 1047, para. 172. The Phase I Reconsideration affirmed that holding and declined to require virtual collocation as well. *Id.,* 2 FCC Rcd at 3053, paras. 126 and 128.

[81] 47 C.F.R. § 1.106(f). We published public notice in the *Federal Register* of the *Phase I Order* on July 3, 1986, and the *Phase I Reconsideration on* June 10, 1987. *See* 51 Fed. Reg. 24350 and 52 Fed. Reg. 21954.

[82] The TSPs assert that evidence in this record, which they imply the Bureau accepted, demonstrates that the benefits of collocation are so substantial for transaction services that AT&T will quickly come to dominate this market unless we reverse our policies regarding collocation.

We reject this argument. First, the extent of the benefits of collocation are less clear in this record than the TSPs suggest. Although it is true, as the TSPs state, that the *Bureau Order* "noted" a TSP assertion that AT&T could achieve savings between 8 and 50 percent by collocating, it did so in a section labelled, "Positions of the Parties," without characterizing the accuracy of that projection. *Bureau Order,* 3 FCC Rcd at 2707, para. 45. AT&T claims that the savings that could be realized from collocation are substantially less. See para. 22 and n. 76, *supra.* Second, even if AT&T Transaction Services can realize substantial efficiencies from collocation, we note that entities like Mastercard, VISA, banks, and other transaction service providers have countervailing advantages of scale, scope, and experience in the financial services market. In contrast, AT&T does not appear to be a major player in the transaction services market at this time. In the first ten months of 1988, all of AT&T's enhanced network services, including Transaction Services, transmitted less than 52 kilopackets of data via APS and generated less than $200,000 in revenues for APS. AT&T's Sixth Semi-Annual Report on ACCUNET Packet Service, filed January 12, 1989, at Figure 1, page 2. Given these factors, it is doubtful, in light of the well-established positions of AT&T's competitors in this market, that collocation will enable AT&T to achieve any rapid dominance over transaction processing, whether or not we require AT&T to provide actual or virtual collocation to other ESPs.

[83] *Transaction Services Order,* 3 FCC Rcd at 2709, para. 59.

[84] The devices commonly described as "PADs" are usually equipped to perform protocol processing as well as packet assembly and disassembly. APS performs neither protocol processing nor packet assembly-diassembly.

[85] *Transaction Services Order,* 3 FCC Rcd at 2709, para. 59.

[86] *Id.,* 3 FCC Rcd at 2709, para. 60.

[87] *Id., citing* Letter from Henry D. Levine to H. Walker Feaster III, filed Feb. 26, 1988 (TSP Letter) at 2.

[88] *Id.* at 2709, paras. 55-60.

[89] AHTUC Application at 9-10.

[90] *Id.* at 10.

[91] AT&T Opposition at 14 n. ***

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-537

In the Matter of

New England Telephone and
Telegraph Company,
Tariff F.C.C. No. 40 Transmittal No. 930

New York Telephone Company,
Tariff F.C.C. No. 41 Transmittal No. 913

ERRATUM

Released: May 30, 1989

1. In the Order adopted by the Commission on April 4, 1989, in the above-captioned proceeding, we inadvertently stated in paragraph 11 that our modified Part 69 access charge rules regarding equal access cost recovery would take effect on May 1, 1989. The correct date the modified rules take effect is June 1, 1989.[1] Paragraph 11 is hereby revised to reflect the correct effective date.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *See* MTS and WATS Market Structure: Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs, CC Docket No. 78- 72, 4 FCC Rcd 2104 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-349

In the Matter of

Amendment of Part 76 of the
Commission's Rules Concerning
Carriage of Television Broadcast
Signals by Cable Television Systems

GEN Docket No. 87-107

Amendment of Part 15 of the
Commission's Rules Concerning Input
Selector Switches Used in
Conjunction with Cable Television
Service

Amendment of Section 76.62(c) RM-6152
of the Commission's Rules

ORDER

Adopted: May 18,1989; Released: May 30, 1989

By the Commission: Commissioner Quello dissenting and issuing a statement.

1. The Commission, by this *Order*, eliminates the mandatory television broadcast signal carriage rules for cable systems, lifts the stay of the input selector switch offer and consumer education requirements, and revises the date by which cable systems must comply with those requirements.

2. On December 11, 1987, the United States Court of Appeals for the District of Columbia Circuit invalidated the Commission's interim mandatory television broadcast signal carriage rules for cable television systems[1] in *Century Communications Corp. v. FCC (Century)*, No. 86-1683, 835 F.2d 292 (D.C. Cir., December 11, 1987). It was unclear, however, whether the court's ruling extended beyond the interim must carry obligations to include the input selector switch and consumer education requirements imposed by Section 76.66 of the Commission's rules.[2] Therefore, the Commission, on December 23, 1987, filed a motion for clarification of the *Century* decision with the court in order to resolve this matter. In conjunction with this filing, the Commission stayed the compliance dates for Section 76.66 of the rules pending clarification by the court.[3]

3. On January 29, 1988, the court issued an *Order*, No. 86-1683, 837 F.2d 517, clarifying that its decision in *Century* does not invalidate the input selector switch and consumer education requirements that were also adopted pursuant to the must carry proceeding. Therein, the court instructed the Commission on remand to make appropriate adjustment to its rules in light of the invalidation of the interim must carry rules.

4. In compliance with the court's ruling and instructions, we are eliminating those portions of our interim rules pertaining to the mandatory carriage of television broadcast signals on cable systems and are revising other sections of our rules, in particular, those in Section 76.66 pertaining to the input selector switch and consumer education requirements, to eliminate reference to must carry requirements.[4] We note that we are retaining those provisions of Sections 76.60 and 76.62 that relate to the signals a cable system may carry and the manner of carriage of television broadcast signals. Although these sections were generally invalidated by the court insofar as they relate to the must carry rules (837 F.2d at 517), the specific provisions being retained do not impose a mandatory carriage obligation and were not included in the court's description of the "must carry regime" under consideration on appeal. *See Century* at 296-97. Moreover, they serve separate regulatory goals. *See , e.g.*, 17 U.S.C. §111(d).

5. As part of our action herein, we are lifting the stay of the input selector switch offer and consumer education requirements, as set forth in Section 76.66, and are revising the date by which cable systems must comply with those requirements. In order to provide a reasonable time frame to allow cable operators to prepare and distribute notices to subscribers in a regular cycle of their billing system, those systems that have not yet mailed to subscribers the switch offer and consumer education information required under the provisions of Section 76.66 that were in effect prior to the stay of the compliance date, will have until November 1, 1989, to fulfill those requirements.[5] Cable systems that have complied with the provisions of Sections 76.66 in effect prior to the stay, will not be required to do a supplemental mailing, but will have to include the new informational requirement in their next annual consumer information mailing.[6] This information should be provided to all new subscribers, however, as promptly as possible and must commence for all subscribers no later than November 1, 1989.[7]

6. The rules modified herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden which the Commission imposes on the public.

7. Accordingly, IT IS ORDERED That Section 76.5 and Sections 76.55 through 76.70 of the Commission's rules ARE AMENDED as set forth in the Appendix below, effective **July 14, 1989.** IT IS FURTHERED ORDERED That the Petition for Rule Making (RM-6152) filed jointly by the Association of Independent Television Stations, Inc. and the National Association of Public Television Stations IS DISMISSED as moot. IT IS FURTHER ORDERED That cable systems that have already complied with the provisions of Section 76.66 in effect prior to the December 23, 1987 stay of the rules, need not do a supplemental mailing to comply with the revised rules. Finally, IT IS ORDERED That the Petition for Supplemental Inquiry or Issuance of a Further Notice of Proposed Rule Making filed by Mr. Richard S. Leghorn *IS* DENIED. Authority for these actions is provided in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, and 521.

2. Section 76.5 is amended by removing paragraphs (d), (j), (jj), (kk) and (ll) in their entirety and redesignating paragraphs (e) through (i) as (d) through (h), and paragraphs (k) through (mm) as (i) through (hh).

3. Section 76.53 is amended by revising the first sentence to read as follows:

§76.53 Reference points.

The following list of reference points shall be used to identify the boundaries of the major and smaller television markets (defined in §76.5).

* * * * *

4. Section 76.55 is removed in its entirety.

5. Section 76.56 is removed in its entirety.

6. Section 76.58 is removed in its entirety.

7. Section 76.60 is revised in its entirety to read as follows:

§76.60 Carriage of other television signals.

A cable system may carry the signals of any television station including low power television stations, television translator stations, foreign television stations, subscription television broadcasts, satellite distributed program services, direct broadcast satellite stations and programming from any other source. A cable system may also carry any ancillary service transmission on the vertical blanking interval or the aural baseband of any television broadcast signal including, but not limited to, multichannel television sound and teletext.

8. Section 76.62 is revised in its entirety to read as follows:

§76.62 Manner of Carriage.

Where a television broadcast signal is carried by a cable system, the signal shall be carried without material degradation and programs broadcast shall be carried in full, without deletion or alteration of any portion thereof.

9. Section 76.64 is removed in its entirety.

10. Section 76.66 is amended by revising paragraphs (c) and (c)(1); and, removing paragraph (c)(2) and marking it reserved to read as follows:

§76.66 Input selector switches and consumer education.

* * * * *

(c) The cable system operator shall provide the following information to each subscriber at the time of installation of cable service and to existing subscribers, in writing, by November 1, 1989, and annually thereafter to all subscribers. Operators may use whatever language they deem appropriate to convey the following:

(c)(1) The cable system is not required to carry any off-the-air broadcast signal; but, of course, may choose to do so; thus,

(c)(2) [Reserved]

* * * * *

11. Section 76.70 is amended by revising the title, paragraphs (a) and (b); and, removing paragraph (c) in its entirety to read as follows:

§76.70 Exemption from input selector switch rules.

(a) In any case of cable systems serving communities where no portion of the community is covered by the predicted Grade B contour of at least one full service broadcast television station, or non-commercial educational television translator station operating with 5 or more watts output power and where the signals of no such broadcast stations are "significantly viewed" in the county where such a cable system is located, the cable system shall be exempt from the provisions of §76.66 of this chapter. Cable systems may be eligible for this exemption where they demonstrate with engineering studies prepared in accordance with §73.686 of this Chapter or other showings that broadcast signals meeting the above criteria are not actually viewable within the community.

(b) Where a new full service broadcast television station, or new non-commercial educational television translator station with 5 or more watts, or an existing such station of either type with newly upgraded facilities provides predicted Grade B service to a community served by a cable system previously exempt under paragraph (a) of this section, or the signal of any such broadcast station is newly determined to be "significantly viewed" in the county where such a cable system is located, the cable system at that time is required to comply fully with the provisions of §76.66 of this Chapter. Cable systems may retain their exemption under paragraph (a) of this section where they demonstrate with engineering studies prepared in accordance with §73.686 of this Chapter or other showings that broadcast signals meeting the above criteria are not actually viewable within the community.

FOOTNOTES

[1] These rules, Sections 76.5(d), (j), (jj), (kk), (ll) and Sections 76.55, .56, .58, .60, .62, and .64, were adopted pursuant to MM Docket No. 85-349. *See generally Report and Order* in MM Docket No. 85-349, adopted August 7, 1986, 1 FCC Rcd 864; and *Memorandum Opinion and Order* in MM Docket No. 85-349 (addressing petitions for reconsideration), adopted March 26, 1987, 2 FCC Rcd 3593.

[2] 47 CFR §76.66.

[3] *See Order* in MM Docket No. 85-349 and GEN Docket No. 87-107 (FCC 87-396) released December 23, 1987.

[4] Consistent with these actions, we also are dismissing as moot a petition for rule making, RM-6152, filed jointly by the Association of Independent Television Stations, Inc. (INTV) and the National Association of Public Television Stations (NAPTS) on August 6, 1987, that requests modifications to one aspect of the interim must carry rules. Petitioners had requested that the Commission require that the tier of service on which must carry signals are carried be accessible on all additional subscriber connections provided by a cable system, whether or not a separate charge is assessed for such additional connections.

[5] The Commission had earlier postponed the date for compliance with these rules from December 10, 1987, to February 29, 1988. This change was made in conjunction with certain additions to the consumer education requirements that were adopted in the input selector switch technical standards proceeding, GEN Docket 87-107, 2 FCC Rcd 7231 (1987). As part of that action, the Commission specified that cable systems that had already complied with the input selector switch and consumer education requirements in effect prior to the new additions would not be required to do a supplemental mailing; rather, they were to include the new information in future mailings commencing with their next annual mailing.

[6] *See Order* in MM Docket No. 85-349 and GEN Docket No. 87-107, *supra*.

[7] In a related matter, on July 21, 1988, Mr. Richard S. Leghorn filed a Petition for Supplemental Inquiry or Issuance of a Further Notice of Proposed Rule Making in MM Docket No. 85-349 and GEN Docket No. 87-107 requesting that the Commission adopt a requirement that television receiver manufacturers build input selector switches into the sets they manufacture. The Commission rejected such a requirement on two separate occasions concluding that market forces are the most appropriate means to lead the television industry to produce sets with such switching capability. *See, Report and Order and Memorandum Opinion and Order* in MM Docket No. 85-349, *supra*.Mr. Leghorn's petition does not present any evidence of any significant change in circumstances since the Commission issued its decisions on this matter that would warrant initiating an action. We, therefore, deny Mr. Leghorn's petition.

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In Re: Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket No. 85-349;

In Re: Amendment of Part 15 of the Commission's Rules Concerning Input Selector Switches Used in Conjunction with Cable Television Service, GEN Docket No. 87-107;

In Re: Amendment of Section 76.62(c) of the Commission's Rules, RM-6152

As a result of the Court's decision in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) clarified 837 F.2d 517 (D.C. Cir. 1988), the Commission is required to eliminate its must carry rules. However, I disagree with the majority's decision to retain the input selector rules and with the language of the rule that will allow cable operators to "cherry pick" local signals.

I find it ironic that the only part of our must carry rules to survive is the input selector switch provision. In this regard, I would remind the Commission that the must carry rules, input selector switch requirements and consumer education program were part of an overall package. We stated:

> If any of these articulated elements were to be deleted, the remaining portions of the program might not be sufficient to achieve our objectives.

Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864, 886 (1986) Admittedly, the court stated that the input selector rules were not inextricably linked to the now moribund must carry rules. *Century Communications Corp. v. FCC*, 837 F.2d at 517. Nevertheless, the decision did not compel retention of the input selector rules. On the contrary, whether the Commission should implement its existing input selector and consumer education rules is a policy decision which the Commission should address.

Viewed from this perspective, I do not see any value in lifting the stay and imposing the input selector switch rules at this time. As I have noted previously, the A/B input selector switch is simply not effective in accessing local broadcast signals. *Memorandum Opinion and Order* in MM Docket No. 85-349, 2 FCC Rcd 3593, 3626 (1987) (Quello, concurring-in-part and dissenting-in-part). Indeed, the most interesting aspect of this proceeding is that both the broadcast and cable industries recognize the practical and technical problems associated with the A/B switch. *See e.g.,* Joint Petition for Reconsideration by National Cable Television Association, Community Antenna Television Association and National Association of Broadcasters in MM Docket No. 85-349, December 17, 1986. Apart from the interference problems associated with improper installation, an A/B switch is only effective if it is connected to an antenna. Unfortnately, the record in this proceeding demonstrates convincingly that most American households no longer have off-air reception capability. Zoning restrictions, terrain problems, man made construction and the systematic dismantling of outdoor antennae significantly reduce the efficacy of the A/B switch as an alternative to manatory signal carriage rules. Moreover, the problem is exacerbated by the Commission's decision to make the A/B switch requirements optional.

I am faced with the decision of implementing a rule that most industry observers believe is not an adequate substitute for carriage requirements and will not provide an adequate means for the American people to access local broadcast signals. Granted the new rules may apprise some cable subscribers of the need to retain off-air capability. However, such knowledge is simply inadequate to solve the problem. Given the Commission's recent data reporting that over 700 television stations have been de-

nied carriage since 1985. I cannot in good conscience support a rule that will not effectively address this problem. *See* Mass Media Bureau Staff Report: Cable System Broadcast Signal Carriage Survey, (September 1, 1988). In this regard, I see no need to burden the cable industry with rules that won't produce the desired effect.

Implementing these rules gives the appearance that the Commission has found a narrowly tailored, content neutral means of ensuring that viewers will have access to free, local over-the-air broadcast television. It most certainly has not. If the adoption of a new set of must carry rules becomes a possibility, I would ask the Congress or a reviewing court to closely examine the evidence in this record concerning the efficacy of the A/B input selector switch. The technology is a poor alternative to a carefully crafted set of carriage requirements.

Independent of my objection to imposing an ineffective A/B switch rule, I also object to the language of the rule itself. Specifically, the rule has revised our "manner of carriage" provisions. *See* 47 C.F.R. Sec. 76.62. This new provision requires that broadcast *programs* be carried in full. In other words, once a cable system has decided to carry a broadcast station it need not carry the broadcast signal in its entirety. Instead, it can "cherry pick" or select specific programming from a menu of local signals. The only requirement is that each specific program be carried in full. In theory, a cable operator could establish a channel that is a composite of all or several local stations in the market.

There is little or no disincentive to engage in "cherry picking" local signals. Of course, for each program selected the cable operator would be required to pay the appropriate compulsory copyright fee as if it had carried the local station's entire signal. However, fees for the carriage of local signals are fairly insignificant. The only concern to the cable operator is that it must carry the program - including adjacent advertising - in its entirety or risk losing the benefit of the compulsory license. *See* 17 U.S.C. Sec. 111(c)(3).

Admittedly, this is precisely the regulatory treatment that existed for non-must carry signals under the old must carry regime. Nevertheless, because the absence of must carry can have a devastating effect on the local broadcast market, I believe the Commission should adopt a requirement that cable operators *choosing* to carry local stations must carry the *entire signal* as opposed to carrying the station on a *program-by-program* basis. Absent such a requirement cable operators will be able to create a composite local channel, selecting only the best programming from each local station.

Requiring cable operators to carry the entire signal of local broadcast stations does not conflict with the *Quincy* and *Century* decisions. *Quincy Cable TV Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert denied sub nom; National Association of Broadcasters v. Quincy Cable TV Inc.*, 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). These decisions prevent the Commission from compelling the carriage of local signals. However, they do not preclude the Commission from adopting "manner of carriage" requirements for broadcast signals that are *voluntarily* carried by cable operators. Cable systems would have the editorial discretion to select whatever local signal they wish to carry. From a constitutional standpoint, there is little difference between a manner of carriage rule that requires programming to be carried in full and one that requires the signal to be carried in full.

In sum, I would not lift the stay preventing the implementation of the A/B input selector switch rules. Instead, the Commission should continue to examine the problems associated with the lack of must carry in its pending *Notice of Inquiry* in MM Docket No. 88-138, 3 FCC Rcd 2698 (May 10, 1988). In addition, the Commission should continue to monitor the marketplace and record incidents of stations being denied carriage, channel repositioning and payment for carriage. Second, cable operators carrying local broadcast stations should carry the entire signal and not be able to "cherry pick" specific local programs. Accordingly, I dissent to the majority's decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure	**CC Docket No. 78-72**
Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board	**CC Docket No. 80-286**

ORDER

Adopted: May 15, 1989; Released: May 16, 1989

By the Chief, Common Carrier Bureau:

1. Call-America, Midco Communications, Inc., Telephone Associates, and Afford-a-Call (hereinafter referred to as Call-America) filed a Petition for Reconsideration of the Commission's decision to revise Part 69 of the rules to provide for an originating Carrier Common Line (CCL) charge of $.01 per minute.[1] Oppositions to Mid-America's Petiton were due on May 1, 1989. However, Mid-America states that the oppositions "were not brought to the attention of their counsel until May 9, 1989, due to the recent merger of counsel's law firm and subsequent disruptions."[2] As a result, Mid-America requests a seven day extension of time for the filing of their response to the oppositions. Mid-America argues that no party will be prejudiced by grant of the requested extension, and further states that counsel for ADAPSO has agreed not to oppose the Motion for Extension of Time. [3]

2. Although Section 1.46 (a) of the Commission rules[4] provides that extensions of time are not to be granted routinely, we believe that the disruptions associated with the recent merger of the law firm representing Mid-America constitue good cause for grant of the brief extension of time requested. Thus, we are extending the date for the filing of responses by interested parties to May 23, 1989.

3. Accordingly, IT IS ORDERED, that the Motion for Extension of Time filed by Mid-America IS GRANTED as provided herein, and that the date for filing oppositions IS EXTENDED to May 23, 1989.[5] IT IS FURTHER ORDERED, that the requirements of Section 1.46 (b) concerning the time for filing requests for extension of time are waived.[6]

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Commission required equalization of the originating and terminating CCL charges in the case of local exchange carriers for which the use of a $.01 originating charge would have resulted in a terminating CCL charge of less than this amount. MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 88-399, 54 Fed. Reg. 6292 (February 9, 1989).

[2] Mid-America Motion for Extension of Time, at 1, May 11, 1989.

[3] *Id.* Mid-America does not state whether other parties oppose the requested extension of time.

[4] 47 C.F.R. § 1.46 (a).

[5] For purposes of this Order, we are treating the oppositions as having been served by mail. Under Section 1.4 (h) of the Commission's rules, an additional three days, excluding holidays, are allowed for filing when the filing period for a response to a document is 10 days or less and the prior pleading is required to be served, and is in fact served by mail. 47 C.F.R. §1.4 (h). (Section 1.429 (f) requires that oppositions to a petition for reconsideration be served on the party filing the petition. 47 C.F.R. § 1.429 (f).) Parties that filed replies before learning of this extension of time may supplement their filings if they wish.

[6] 47 C.F.R. §1.46 (b). This rule requires parties to file requests for extension of time in Rule Making proceedings 7 days in advance of the filing date involved. This action is taken pursuant to Sections 4 (i) and (j) and 5(c) of the Communictions Act, 47 U.S.C. §§ 154 (i) and (j), and 155 (c), and Sections 0.91, 0.291, and 1.46 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.46.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 18, 1989

Released: May 18, 1989

Michael L. Glaser, Esq.
Gardner, Carton & Douglas
Republic Plaza
370 17th Street
Suite 220
Denver, Colorado 80202-3520

David Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: BPH-870430IB; BLH-890104KC

Dear Messrs. Glaser and Tillotson:

This letter disposes of various *ex parte* matters raised in connection with the above-captioned proceeding.[1]

By way of background, in April 1987, Western Cities Broadcasting, Inc. (Western) filed the above-referenced minor change application relating to station KQKS-FM, Longmont, Colorado. William J. Schueller d/b/a Eldorado Communications (Eldorado) and Boulder Communications (Boulder) filed Petitions to Deny. By letter dated December 27, 1988, the Chief, Audio Services Division, Mass Media Bureau, treated the petitions as informal objections pursuant to 47 C.F.R. § 73.3587, and denied them. On December 29, 1988, Western filed a Petition for Partial Reconsideration and Clarification to which Boulder filed an Opposition on January 9, 1989. Boulder also filed an Emergency Request for Order to Temporarily Reduce Operating Power of KQKS-FM on January 20, 1989.

In addition, on January 30, 1989, Western filed an application for a license to cover. On January 30, 1989, Boulder and Eldorado filed a Petition to Deny License Application and Revoke Operating Authority. This Petition was also treated by the Chief, Audio Services Division, as an informal objection in letters dated March 3, 1989 and April 6, 1989. On February 10, 1989, the Commission received from Senator Tim Wirth a January 17, 1989, letter from Boulder Communications relating to the merits of these interrelated proceedings. On March 10, 1989, the Managing Director, in a letter served on the parties, informed Senator Wirth that because his letter related to a restricted proceeding, it was being handled pursuant to the Commission's *ex parte* rules governing restricted proceedings.

Western urges that sanctions be imposed on Boulder for soliciting *ex parte* communications from Senator Wirth (and others). Boulder argues that the proceedings are not restricted because the various Petitions to Deny were treated as informal objections. In addition, Boulder alleges that, if the proceedings were treated as restricted, then Western has also violated the *ex parte* rules by suggesting to Commission staff that the Field Operations Bureau be asked to mediate the dispute that underlies these proceedings.

As a preliminary matter, these two proceedings were restricted at the time of the solicitations by Boulder and the conversations by Western. The Petitions to Deny filed by Boulder and Eldorado met the requirements of a "formal opposition" under the *ex parte* rules. *See* 47 C.F.R. § 1.1202(e). Accordingly, both the construction permit and license proceedings became restricted upon the filing of the Petitions to Deny, and remain restricted until the proceedings are no longer subject to Commission or court review or reconsideration. *See* 47 C.F.R. § 1.1208(a), (c)(1)(i)(B). Accordingly, *ex parte* presentations, and solicitations thereof, are prohibited. 47 C.F.R. §§ 1.1208(a), 1.1210. The fact that the Mass Media Bureau treated the Petitions to Deny as informal objections for purposes of 47 C.F.R. § 73.3587 does not affect their status as formal oppositions under the *ex parte* rules. *See Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3015 & nn. 20 & 21, *on reconsideration*, 2 FCC Rcd 6053 (1987).

Boulder does not dispute the fact that it solicited *ex parte* presentations; it merely claims the proceedings were not restricted. As discussed above, the proceedings were in fact restricted. Boulder was apparently confused as to whether an informal objection could also constitute a formal opposition for *ex parte* purposes. We have no evidence before us that its violation of the rules was intentional. Accordingly, while we believe that Boulder should have exercised greater care in following the Commission's *ex parte* restrictions, we also believe the Commission should not impose sanctions under the circumstances.

Finally, with respect to Western's alleged violation of the *ex parte* rules, we address here the question of whether a request to Commission staff to "mediate" a dispute or otherwise act to encourage a settlement among the parties constitutes an *ex parte* presentation. While the Commission's *ex parte* rules permit *ex parte* presentations made in response to settlement-related inquiries by Commission staff, *see* 47 C.F.R. § 1.1204(b)(7), no comparable exemption exists for *ex parte* presentations by parties or other persons outside the Commission to encourage the institution of settlement negotiations under Commission staff auspices.

The Commission strongly encourages parties to settle their differences. Properly submitted requests for the Commission staff to mediate disputes or otherwise act to facilitate settlement among the parties are to be encouraged. Nevertheless, although this is a close question, as a general matter requests that the Commission staff mediate disputes or initiate settlement discussions are "directed to the merits or outcome of a proceeding," and therefore may not be made in a restricted proceeding without service on all parties or an opportunity for all parties to be present.[2] *See* 47 C.F.R. §§ 1.1202(a)&(b), 1.1208(a). It appears to be inherent in such requests that the person making the request is urging an outcome different than that proposed by at least one of the parties. Accordingly,

we find that Western violated the *ex parte* rules by its oral *ex parte* requests to Commission staff that the Field Operations Bureau mediate the dispute. Under the circumstances, we do not believe sanctions are appropriate, as there is no evidence that Western intended to violate the *ex parte* rules.

Sincerely,

Edward J. Minkel
Managing Director

cc: David E. Weisman, Esq.
Michael A. Menius, Esq.

FOOTNOTES

[1] The following documents are pending before us: (1) Complaint and Request for Sanctions, filed on behalf of Western Cities Broadcasting, Inc. (Western) on March 30, 1989; (2) a letter to the Managing Director from counsel for Carl Schlueter d/b/a Boulder Communications (Boulder), received on March 31, 1989; (3) Boulder's Opposition to Complaint and Request for Sanctions, received April 12, 1989; and (4) Western's Reply to Opposition to Complaint and Request for Sanctions, filed April 20, 1989.

[2] Requiring that requests to initiate settlement discussions in restricted proceedings be made in writing and served on the parties (or, if oral, be made with an opportunity for the parties to be present) is not burdensome and should not in any way discourage settlements. Indeed, to the extent that a party is unwilling to make its request known to the other parties, it would confirm our view that such requests go to the merits or outcome of the proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMENDMENTS TO BOC ONA PLANS

(CC Docket No. 88- 2, Phase I)

Released: May 19, 1989

In the *BOC ONA Order*, 4 FCC Rcd 1 (1989), the Commission required the Bell Operating Companies (BOCs) to file amendments to their Open Network Architecture (ONA) Plans on May 19, 1989. The Commission seeks comments on the BOCs' amendments.

In the *BOC ONA Order*, the Commission approved the BOCs' ONA Plans in substantial part. However, the Commission identified a number of areas that required revisions. The BOCs were required to amend their ONA Plans on May 19, 1989, to augment their initial sets of ONA services, to conform to tariffing requirements that were adopted in the *BOC ONA Order*, and to supplement information on the technical specifications of network interfaces.

The Commission also required the BOCs to file amendments and information to improve their treatment of nonstructural safeguards, uniformity issues, the classification of ancillary services, and plans for future ONA services.

Until the Commission approves the BOCs' amendments and the BOCs implement their own plans, the structural separation requirements for BOC provision of enhanced services will remain in place. However, pending the Commission's review of the amendments and supplemental information that is required to be filed on May 19, 1989, the BOCs may continue to offer on an unseparated basis those enhanced services for which they have or obtain approved Comparably Efficient Interconnection (CEI) plans.

Interested parties should file comments on the BOCs' amendments by July 12, 1989, and reply comments by August 11, 1989, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the BOCs' amendments can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

IDB COMMUNICATIONS GROUP, INC.

File No. 884-DSE-MP/L-89
Call Sign: E870502

For Authority to Modify its Domestic Fixed-Satellite Earth Station in Salt Lake City, Utah

ORDER

Adopted: May 18, 1989; Released: May 19, 1989

By the Chief, Domestic Facilities Division:

1. On February 27, 1987, IDB Communications Group, Inc. (IDB) was authorized to construct and operate a transmitting domestic fixed-satellite earth station in Salt Lake City, Utah.[1] IDB's application had specified the geographic coordinates for this station as 40:46:12N/111:54:07W, and the station license reflects these coordinates. IDB subsequently constructed and began operating the station.

2. On February 6, 1989, IDB filed an application indicating that it had determined that the actual location of the earth station is 4 seconds east of the licensed coordinates, that is, at 40:46:12N/111:54:03W. It therefore requested that we modify its license to reflect these coordinates. We placed IDB's modification request on public notice on March 15, 1989.[2] No comments or oppositions were received during the thirty day public notice period, and we granted the application on April 21, 1989.

3. However, on the same date, we received a letter from Comsearch, Inc. stating that frequency coordination for the new location had not been completed. Comsearch requests that we defer action on IDB's application until the coordination process is completed. IDB filed a response to Comsearch's objection on May 15, 1989, stating that IDB's modification simply corrected an inadvertent error in the licensed geographic coordinates of an operating earth station. It also states that the entity subject to interference from IDB's operations, Western Telecommunications, Inc., would receive such interference even if IDB's station were located at the licensed coordinates. IDB therefore requests we deny Comsearch's objection.

4. In order to provide time to consider this matter fully, IT IS ORDERED, pursuant to Section 1.113 of the Commission's rules, 47 C.F.R. § 1.113, that the modification to E870502 granted on April 21, 1989, File No. 884-DSE-MP/L-89, is SET ASIDE. This order IS EFFECTIVE upon ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] File No. 845-DSE-P/L-87.

[2] *See* Public Notic Report No. DS-836.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PACTEL CELLULAR	File No. 10119-CL-P-544-B-88
For Construction	File No. 10121-CL-P-546-B-88
Permits to establish new	File No. 10122-CL-P-547-B-88

cellular systems to operate on frequency block B in the Domestic Public Cellular Radio Telecommunications Service to serve Market 544, Nevada 2 (Lander); Market 546 Nevada 4 (Mineral); and Market 547, Nevada 5 (White Pine)

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1989; Released: May 31, 1989

By the Chief, Common Carrier Bureau:

1. PacTel Cellular (PacTel) seeks reconsideration of the decision of the Mobile Services Division denying PacTel's request for a limited waiver of Section 22.923(b)(2) of the Commission's rules and dismissing the captioned applications. Comments in opposition to the petition for reconsideration were filed by Lincoln Communications, Inc. (Lincoln)[1] and Beehive Telephone Co., Inc., Nevada (Beehive).[2] Comments supporting PacTel's petition were filed jointly by Romulus Engineering (Romulus) and Independent Cellular Telephone (ICT).

I. BACKGROUND AND CONTENTIONS

2. The referenced applications were chosen first in the Commission's cellular lottery held on December 8, 1988 for the captioned wireline markets. A public notice announcing the lottery results was released the following day, December 9, 1988. *See* Common Carrier Public Mobile Services Information, Report No. CL-89-48, Mimeo No. 833 (December 9, 1988) (Public Notice). That Public Notice described, *inter alia*, the requirement that each lottery winner submit the original and two paper copies of the application within seven (7) days of the date of the Public Notice as required by Section 22.923(b)(2) of the Commission's rules.[3] PacTel submitted the required filings on December 21, 1988, two days after the due date. At the same time it filed a waiver request and acceptance of its submission of the paper copies of its applications.[4] In support of its request, PacTel stated that it was unaware of the Public Notice announcing it as the lottery winner in the listed markets until it received the notice in the mail on December 20, 1988.[5] Moreover, PacTel argued that grant of the waiver would not unduly delay the Commission's normal processes and would not prejudice any other party. By letter, the Mobile Services Division (MSD) found PacTel's arguments unpersuasive and dismissed all three referenced applications for failure to file the paper originals in a timely manner.[6]

3. In its petition for reconsideration, PacTel provides additional information on the procedures it relies upon to receive public notices and news releases from the Commission and gives further information regarding its failure to make its required filings in a timely manner. PacTel states that in addition to its arrangement with ITS, it also receives as a backup the Commission's daily releases from Bell Communications Research (Bellcore).[7] However, PacTel states that its Washington office never received a copy of the Commission's December 9 Public Notice from Bellcore and did not learn of the December 9 Public Notice until December 20, one day after the December 1 due date.

4. PacTel argues that denial of its waiver request is inconsistent with previous Commission decisions and with the underlying purpose of the Commission's rules which, PacTel points out are designed to expedite the provision of cellular service to rural markets. PacTel cites *Armstrong Telephone Co.*, 3 FCC Rcd 1665 (1988), where the Commission affirmed the grant of a waiver by the Chief of the Common Carrier Bureau to a cellular applicant who had failed to file its "firm financial showing" within the 30-day period required by the Commission's rules. There, the Commission agreed with the Bureau that strict enforcement of the filing deadline would not be in the public interest because additional service and competition in the market would be significantly delayed. According to PacTel, the Commission should employ the same public interest test and arrive at the same result in this case.[8] In light of the Commission's decision in *Armstrong*, PacTel contends, it would be arbitrary and an abuse of discretion for the Commission to deny PacTel's limited waiver request, citing the court's decision in *Green Country Mobilephone, Inc. v. F.C.C.*, 765 F. 2d 235 (D.C. Cir. 1985).[9]

5. In their comments supporting PacTel's petition, Romulus and ICT cite Commission rules which they claim require publication of all policies and requirements of the Commission before a person can be legally bound to comply with those policies or requirements.[10] Romulus and ICT contend that the Commission does not routinely serve applicants with notice of lottery results, those results are not published in the Federal Register or elsewhere, and many applicants do not have a method to receive Commission daily releases. Because of these factors, Romulus and ICT maintain, it would be unfair for the Commission "to give binding effect to a document of which the [applicants] have neither actual nor constructive notice." Comments of Romulus Engineering at 2.

6. In its opposition, Lincoln maintains that PacTel has failed to make the necessary showing that grant of its waiver request is warranted. In Lincoln's view, PacTel's reliance upon mail delivery of the Commission's public notices and its failure to determine the reason why it did not receive the December 9 releases soon after that date, suggest that PacTel was negligent. Lincoln contends that Section 22.923(b)(2) of the rules placed PacTel on notice that it would have only a limited amount of time within which to submit the required paper copies of its Nevada 5 RSA application. Therefore, Lincoln argues that it was incumbent upon PacTel to use a reliable method to ensure that it would receive promptly the public notices. Lincoln argues that PacTel's decision to rely upon mail delivery instead of obtaining same day delivery of Commission releases available through various sources resulted

in the foreseeable consequence of PacTel not meeting the filing deadline. Under these circumstances, Lincoln asserts that a waiver should not be granted.[11]

7. In its reply to Lincoln's opposition, PacTel argues that the issue here is not whether it was negligent in its attempts to obtain a copy of the Commission's public notice, but whether "considering all of the facts and circumstances, it is in the public interest for waivers to be granted to PacTel so that cellular service can be established in these rural areas as soon as possible."[12] In support, PacTel cites *Portland Cellular Partnership*, (FCC 89-59) (released February 28, 1989), *appeal pending*, *Northeast Cellular Telephone Company, L. P. v. FCC*, No. 89-1206 (filed March 23, 1989).[13] PacTel argues that the Commission's decisions in these cases make clear that the public interest is best served by granting its requested waiver.[14]

II. DISCUSSION

8. In determining whether to grant a request for waiver of the rule in question we are guided by Section 22.19 of the Commission's rules. 47 C.F.R. §22.19.[15] In its waiver request, PacTel stated that it was unaware of the December 9 Public Notice until December 20 and that grant of its request would not delay the staff's processing and would not prejudice any party because of the additional filings due within 14 days and 30 days of the date of the public notice.

9. In the circumstances of this case we conclude that dismissal of the referenced applications would disserve the public by delaying cellular service to the rural communities involved and would impose an unduly harsh penalty. Section 22.923(b)(2) was adopted in the Commission's *Further Order on Reconsideration*, CC Docket No. 85-388, FCC 88-156 (released May 18, 1988), in which certain procedural and filing requirements were adopted and modified "[t]o expedite the processing of [RSA cellular] applications." PacTel's two-day delay in filing the paper copies of its applications was a minor violation of a procedural rule which did not cause processing delays of the kind that we have encountered with the pre-screening of cellular applications.[16] Indeed, the MSD staff was able to use the microfiche copies of the applications during this two-day period.[17] Thus, the untimely filing of the paper applications did not delay the preparation of the public notice announcing the applicants as the tentative selectees.

10. Moreover, PacTel has strictly complied with the initial filing deadlines under Section 22.31.[18] After an application has met our pre-lottery filing requirements, we have allowed minor discrepancies to be corrected. *See e.g., Timothy Roper*, FCC 89-133 (released May 17, 1989) (application amended to correct technical exhibits and minor errors in cost figures); *James K. Larrington Corporation*, 2 FCC Rcd 1529 (Com. Car. Bur. 1987) (amendment allowed correcting wattages relating to maximum radiated power); *Werner, Burton K.*, 2 FCC Rcd 1484 (Com. Car. Bur. 1987) (amendment of an application to correct a typographical error of the ERP (effective radiated power) figure). An application is not returned as defective if it contains information that is generally complete and contains only minor errors. *See Advanced Business Communications, Inc.*, 2 FCC Rcd 3751 (Mob. Ser. Div. 1987). To dismiss PacTel's applications in the post-lottery stage, before its filings have been reviewed for technical and legal compliance is inconsistent with decisions where we have allowed correction of minor errors of generally complete applications. Moreover, dismissal would also be inconsistent with the MSD's policy of granting requests for extensions of time for filing Section 1.65 amendments and other post-lottery filings. While we emphasize the need to observe procedural requirements, we recognize that excessive rigidity in applying the seven-day rule for filing paper copies of the application is not in the public interest and would not serve the underlying purpose of the rule section in question. Moreover, we are reluctant to impose the ultimate penalty of dismissal where the late filings did not cause processing delays. *Compare* fn. 16. Commission applicants are charged with the responsibility of making themselves aware of our rules and filing deadlines.[19] In this case, however, PacTel had taken affirmative steps to obtain a copy of the public notice through two different sources. Delay in filing the originals was only two days and PacTel requested a waiver of the seven-day rule. We emphasize, however, that in the future we expect PacTel and all other applicants to adhere to the seven-day rule.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, that the captioned applications of PacTel Cellular File Nos. 10119-CL-P-544-B-88, 10121-CL-P-546-B-88 and 10122-CL-P-547-B-88 ARE REINSTATED *nunc pro tunc*.[20]

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Lincoln opposes reinstatement only of PacTel's application to serve the Nevada 5 - White Pine (Market 547) rural service area.

[2] Beehive filed a one page letter generally opposing grant of PacTel's petition and urging the Commission to affirm the MSD's decision dismissing the applications.

[3] Section 22.923(b)(2) provides that

> Within seven (7) days of the release date of the public notice announcing the lottery results, the applicant selected first in the lottery shall submit the original and two hard copies of the application . . . .

[4] Under Section 1.4(b) of the rules, the first day to be counted when a period of time begins with an action taken by Commission staff pursuant to delegated authority is the day after the day on which public notice of that action is released. However, when the date of public notice falls on a weekend or a holiday, as it did in this case (Saturday, December 10, 1988), public notice occurs on the next business day. Therefore, the public notice date of the December 9 notice was December 12, 1988.

[5] PacTel stated that it receives all Commission Public Notices and other releases through the International Transcription Services (ITS), the Commission's contractor for reproduction of its documents for public use.

[6] The applications were dismissed by letter from the Deputy Chief, Mobile Services Division, to William F. Adler, Pacific Telesis Group (December 23, 1988).

[7] Bellcore is a research company funded jointly by the seven Regional Bell Operating Companies.

[8] PacTel also cites *Timothy Donald Engelgau*, 2 FCC Rcd 6909 (1987), to support its position. In that case, the Commission granted applicant's request for a waiver of Section 22.913(a)(2) of the rules because he was unable to obtain a map with a correct scale. The waiver was granted, PacTel notes, even though the second ranked applicant had objected and no additional lotteries would have been required if Engelgau's application had been dismissed.

[9] In *Green Country* the court found that the Commission abused its discretion in refusing to grant a waiver of the 5:30 p.m. application filing deadline. The applications arrived between 5:30 and 5:33 because the applicant's duplicating equipment broke down. The court held that the Commission's decision was inconsistent with *Caldwell Television Associates, Ltd.*, 53 Rad. Reg. 2d (P&F) 1686 (1983), where an application was accepted when it arrived one day late because of severe weather conditions. The Commission overruled *Caldwell* prospectively in *Waivers of Application Filing Deadline*, 58 Rad. Reg. 2d (P&F) 1706 (1985).

[10] In support of their position, Romulus and ICT cite Section 0.445(e) of the Commission's rules which states in part

> [n]o person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or a document stating it has been published as provided in this paragraph. . . .

and Section 0.411(b)(2) which provides in part that

> Commission documents having general applicability and legal effect are . . . published in the Federal Register.

[11] Lincoln disagrees with PacTel's assertions that denial of its waiver request would be inconsistent with *Armstrong, supra*. Lincoln notes that in that case, Armstrong was the only wireline applicant for the market. In the absence of a waiver, the Commission would have been required to reopen the wireline block for new applications which would have significantly delayed commencement of cellular service to the public. Here, Lincoln states, it has already entered into a pre-lottery settlement agreement with the only other wireline applicant in the Nevada 5 RSA market. Therefore, Lincoln contends, an additional lottery would not be necessary if PacTel's application were dismissed.

[12] PacTel does not respond to Beehive's filing but characterizes it as a "vitriolic, *ad hominem* " attack. Beehive essentially argues that PacTel was negligent in failing to file its applications in a timely manner.

[13] In *Portland*, the Commission, on its own motion, granted a waiver of its firm financial commitment rules even though the applicant (a partnership of telephone companies, including NYNEX Mobile Communications) failed to make a proper and timely financial showing. The Commission decided, on the facts of that case, that the policy goals of the rules and the overall public interest would not be served if it disqualified an entity that indisputably has not engaged in speculation and is financially qualified.

[14] In any event, PacTel asserts that it was not negligent because while its Washington office did receive a copy of most of the releases for December 9, 1988 from Bellcore, that packet of releases did not include a copy of the Commission's Public Notice announcing the lottery results for the captioned Nevada markets.

[15] Section 22.19 provides in pertinent part:

> (a) Request for waivers. (1) Waivers of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing.
>
> (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or
>
> (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.
>
> * * * * *

[16] *See e.g., Cellular Lottery Proceeding*, First Order on Reconsideration, 58 Rad. Reg. 2d (P&F) 677, 696 (1985), where we established our "letter perfect" standard for evaluating cellular applications. There, we stated explicitly that "we will require all future cellular applications to be filed in a 'letter perfect' condition, and failure to conform to this standard will constitute grounds for rejection of the application as unacceptable for filing." Under *Johnstown Cellular Communications Co.*, 1 FCC Rcd 1164 (Com. Car. Bur. 1986), *aff'd Jacksonville Cellular Telephone Company*, 3 FCC Rcd 5386 (1988), the letter perfect standard is only applied to the initial intake of cellular applications and applies to specific items such as the certification, the cover of the application, and the microfiche copies. The seven-day rule in Section 22.923(b)(2) does not fall within the letter perfect category, and therefore, the letter perfect standard is not applicable here.

[17] Pacific had filed microfiche copies of its applications in accordance with the rules.

[18] While Section 22.20 (b)(7) allows for dismissal of applications filed after the cutoff date prescribed in Section 22.31, that is not the case here. PacTel's applications have already met this pre-lottery requirement.

[19] The contention of Romulus and ICT that applicants cannot be required to comply with the seven-day rule because the public notice announcing the lottery winner is not published in the Federal Register is incorrect. Our rules, which have been published in the Federal Register, explicitly state that the paper original application must be filed within seven days of the date of public notice announcing the lottery winner. 47 C.F.R. Section 22.923(b)(2). Commission applicants are on clear notice that they should take reasonable steps to follow our public notices whether or not they have actual knowledge of them. Anyone can obtain copies of our public notices from our copy contractor.

[20] PacTel has filed its Section 1.65 amendments for these markets in accordance with the schedule specified in the December 9 Public Notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 31, 1989

CINCINNATI BELL TELEPHONE COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On May 16, 1989, the Cincinnati Bell Telephone Company (CBT) filed proposed revisions to its permanent cost allocation manual for the separation of regulated and nonregulated costs. CBT's proposed revisions reflect the reclassification of its packet switching service offering from nonregulated to regulated. CBT filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manual no later than **June 20, 1989.** Replies should be filed by **July 6, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Annual Report Form M

ERRATUM

Released: May 31, 1989

By the Chief, Common Carrier Bureau:

The ordering clause of the *Memorandum Opinion and Order* (DA 89-503), released May 12, 1989, states that the revised Form M schedules contained in Appendix B attached thereto would be effective 30 days from publication of the schedules in the Federal Register.

The ordering clauses should read as follows:

IX. ORDERING CLAUSES

141. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, 219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 201-205, 215, 219, and 220, that the revised Form M schedules contained in Appendix B attached ARE ADOPTED.

142. IT IS FURTHER ORDERED, that subject carriers SHALL FILE a revised Form M within 60 days from release of this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 31, 1989

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On May 10, 1989, the Southern New England Telephone Company (SNET) filed proposed revisions to its permanent cost allocation manual for the separation of regulated and nonregulated costs. SNET filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). On February 7, 1989, SNET was required to make certain revisions to its cost manual. *See The Southern New England Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 4 FCC Rcd 1400 (1989).

Parties may file comments on the proposed revisions to the cost manual no later than **June 20, 1989.** Replies should be filed by **July 6, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1691

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1989; Released: May 31, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including Rochester Telephone Corporation (Rochester), to file a manual for separating costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Rochester filed a cost allocation manual on August 28, 1987. This manual described Rochester's nonregulated activities, listed the activities Rochester proposed to treat as incidental activities, and provided information on Rochester's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed this manual in the *Rochester Order* [2] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved Rochester's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that Rochester submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[3]

3. Rochester submitted its revisions, which provide additional information regarding the problem areas identified in the *Rochester Order*, on February 10, 1989. According to Rochester, these revisions comply fully with that Order.[4] No party commented on these revisions.

4. After reviewing the contents of Rochester's revised manual, we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *Rochester Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas in which Rochester has complied fully with Commission requirements and the *Rochester Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve Rochester's February 10, 1989 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than June 30, 1989.

II. DISCUSSION

A. Overall Sufficiency of the Manual

5. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *Rochester Order*, we required Rochester to provide additional, and in certain instances, corrected information regarding each of these areas. In its revised manual, Rochester provides additional information regarding these areas.

B. Affiliate Transactions

6. In the *Rochester Order*, we indicated that it was not clear from Rochester's descriptions of its affiliates whether the asset or service rules apply. In its revised manual, Rochester has addressed the nature of transactions between Rochester and affiliated companies. Rochester indicates that it uses market rates or fully allocated costs for services. However, it is not clear whether the term "market rate" meets the criteria for determining the terms of affiliate transactions because there is no definition of this term in the manual. For transactions involving the provision of a service, we determined in the *NYNEX Compliance Order*[5] that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[6] We held that the only general exception to this costing methodology "permits the carrier to record an affiliate's services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[7] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[8] Finally, untariffed services that carriers provide to nonregulated affiliates must also be recorded at the carriers' fully distributed costs unless the carriers provide the same services to nonaffiliated entities in a sufficiently large number of cases to establish a market rate.[9] In its further revisions, Rochester must define the term "market price" and must verify that each affiliate transaction involving the provision of a service that it proposes to provide at market prices meets the above criteria.

7. If the transaction involves a transfer of assets, the carrier should record it at the prevailing price held out to the general public, that is, the prevailing company price. If there is no prevailing company price, asset transfers from the affiliate to the carrier should be recorded at the lower of net book cost or fair market value, while asset transfers from the carrier to the affiliate should be recorded at the higher of net book cost or fair market value. Rochester's definition relating to the transfer of assets must state that its manual conforms to this definition.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the February 10, 1989 revisions to Rochester's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

9. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than June 30, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987).

[2] Rochester Telephone Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7056 (1988) (*Rochester Order*).

[3] *Id.* at 7056, paras. 2-3; *id.* at 7060 and 7061, paras. 42-43.

[4] Rochester Revised Manual, Cover Letter, dated February 10, 1989.

[5] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5976 (1988) (*NYNEX Compliance Order*).

[6] *Id.* at 5980, para. 20.

[7] *Id., quoting* 47 C.F.R. §32.27(d).

[8] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 199, paras. 33-34 (1988) (*U S West Order*).

[9] *Id.* at para. 33.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Puerto Rico Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1701

ORDER

Adopted: May 19, 1989; Released: May 31, 1989

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. On January 30, 1989, Puerto Rico Telephone Company (PRTC) filed a "Petition for Partial Reconsideration" of the Common Carrier Bureau's (Bureau) December 29, 1988 *PRTC Order* [1] concerning the cost allocation manual of PRTC. PRTC requests that the Bureau reconsider its directive that PRTC list and describe all dealings with the various branches, arms, and agencies of the Puerto Rico government. Instead, PRTC argues that the Bureau should find that the affiliates of PRTC are only Puerto Rico Telephone Authority (PRTA) and PRTA's subsidiaries PRPBC, Discorp, Telefonica Hispanoamerica, and Telefonica Larga Distancia de Puerto Rico. For the reasons stated below, we deny the PRTC petition.[2]

BACKGROUND

2. In the *PRTC Order* we found that PRTC is a subsidiary of PRTA, a governmental entity, that is affiliated with all other government entities in the government of Puerto Rico. Consequently, pursuant to the requirements of the *Joint Cost Order*,[3] the *PRTC Order* directed PRTC "to list all affiliates, both within the PRTA and in other areas of the Puerto Rico government, which it engages in or will engage in transactions, and describe the nature, terms and conditions of those transactions."[4]

3. PRTC argues that the Bureau's "requirement encompasses too broad a definition of 'affiliate,' is unnecessary to achieve the purposes of the *Joint Cost Order*, and would be extremely burdensome to implement."[5] It also notes that past Commission practice recognizes the legal and functional separation between PRTA and the Commonwealth and other government agencies. It cites the 1987 legislation enacted by the Commonwealth which transferred stations from the Department of Education to the Puerto Rico Public Broadcasting Corporation subject to the consent of the Federal Communications Commission (FCC). It reasons that because the FCC's Mass Media Bureau advised PRTC that it was a separate entity, the transfer involved a substantial change in controlling interests, and thus, required prior FCC approval.

4. PRTC maintains that "the Bureau provides no authority for such an expansive definition of 'affiliate,' and does not explain the rationale behind such a designation, which is inconsistent both with the facts and with the Commission's own practices."[6] It concludes that although PRTC is a public corporation, it functions as an independent entity with respect to the government of Puerto Rico.

5. PRTC believes that the Bureau's directive is not needed to achieve the purposes of the *Joint Cost Order*. It maintains that improper transfer pricing presents no danger with respect to transactions between PRTC and other governmental agencies since all transactions between PRTC and these agencies are conducted as if PRTC were a privately-owned company, with services and equipment provided pursuant to tariff or published uniform prices. Moreover, PRTA argues that it is required to obtain competitive bids for virtually all construction and purchase contracts valued at $10,000 or more. Finally, PRTC argues that its ability to engage in improper transfer pricing is further constrained by the presence of two "consumer interest" members of its Board of Directors.

6. PRTC contends that the reporting and recording requirements created by the Bureau's directive would be extremely burdensome because PRTC provides numerous services and facilities to virtually all governmental entities, which number in the thousands. It estimates that this requirement would cause PRTC to expend hundreds of hours of employee time compiling volumes and volumes of records.

DISCUSSION

7. As the Commission stated in the *Joint Cost Order*, "[o]ur goal in establishing standards for transactions between affiliates is to prevent cost shifting to ratepayers by means of improper transfer pricing."[7] The Commission added that accounting safeguards are essential and a prerequisite to the operation of carriers in unregulated markets. The affiliate transaction requirements are a key part of our deregulatory effort and reflect a careful weighing of costs and benefits. Accordingly, we cannot agree with PRTC's assertions that this requirement encompasses too broad a definition of "affiliate," and is unnecessary to achieve the purposes of the *Joint Cost Order*. The affiliate transaction rules ensure that the Commission has sufficient information to prevent carriers from violating the *Joint Cost Order*. The Commission would be shirking its responsibility to protect the public interest if it was unable to prevent improper cross-subsidies because it did not have the information necessary to monitor such transactions.

8. Similarly, we are not persuaded by PRTC's concerns regarding potential reporting and recordkeeping burdens. These burdens are minimal for transactions involving tariffed prices which PRTC concedes constitute a significant portion of its affiliate transactions. The Commission considered such concerns in the *Joint Cost Order* and concluded that the potential reporting and recordkeeping burdens associated with our rules did not outweigh the benefits of ensuring compliance. As an initial matter, listing agencies is not a major burden. After PRTC lists all its affiliates, it could easily maintain computerized records of its nontariffed transactions with each applicable affiliate. PRTC could then track its affiliate transactions using a unique coding. For auditing purposes, a computerized run of all these transactions would allow Commission staff to review such activities in an efficient manner.

9. PRTC states that all of its affiliate transactions involve either tariffed rates or "published, uniformly applicable prices."[8] To the extent tariffed rates are involved, the reporting and recordkeeping requirements are no more burdensome than those applicable to transactions with nonaffiliates. To the extent "published, uniformly applicable prices" are involved, PRTC will have to retain the information that persuaded it to classify those prices as market prices[9] and will have to make that information available to Commission auditors. Those requirements should not be burdensome. Finally, if PRTC engages in affiliate transactions that are provided neither under tariff nor at market prices, PRTC will have to retain sufficient information to establish that the prices PRTC records for the transactions reflects the transactions' fully allocated costs. While we must require PRTC to retain this information if we are to protect consumers,[10] we believe that this latter requirement will be applicable to few, if any, of PRTC's affiliate transactions.

10. PRTC is the sole provider of local telephone service in Puerto Rico. It, like other local telephone operating companies, has key bottleneck facilities which all persons and entities must use. This control gives PRTC the ability to shift resources from areas where it maintains complete dominance to those areas where it is developing new markets. Our rules are intended to discourage carriers in such situations from developing new competitive markets by utilizing resources obtained and financed by overcharging users of its bottleneck facilities. The Commission does not intend to monitor all of PRTC's business interests or those of its governmental affiliates. However, by examining transactions over a period of time, we would be in a position to determine whether PRTC is aiding improperly these competitive activities. Moreover, we could obtain a record of any cost shifting which may appear to be improper.

CONCLUSION

11. In view of the foregoing, the Bureau finds that there is no good cause for reconsideration of the requirement to list all affiliate transactions. We therefore deny PRTC's "Petition for Partial Reconsideration."

12. Accordingly, IT IS ORDERED, That the "Petition for Partial Reconsideration" filed by PRTC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Puerto Rico Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7321 (1988) (*PRTC Order*).

[2] On February 24, 1989, PRTC filed a motion for additional time to file the amendments regarding its transactions with the other entities of the Puerto Rico government. We granted this request, and those amendments are now due to be filed within 15 days of release of this order. *See* letter from Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul J. Berman, counsel for PRTC, April 7, 1989.

[3] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v FCC, D.C. Circuit No 87-1764 (filed December 14, 1987).

[4] *PRTC Order*, 3 FCC Rcd at 7322, para. 11.

[5] PRTC Petition for Partial Reconsideration at 2.

[6] *Id.* at 4.

[7] *Joint Cost Order*, 2 FCC Rcd at 1335, para. 290.

[8] PRTC Petition at 7.

[9] For assets, the published price is a market price if and only if it is generally available and is applied to a substantial number of transactions between PRTC and third parties. For services, the published price is a market price if and only if nonaffiliates actually pay that price to PRTC or receive it from PRTC in a substantial number of transactions.

[10] We cannot properly delegate our obligations in this respect to the "consumer interest" members of PRTC's Board, as PRTC suggests.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-78

In the Matter of

Inquiry into the Need for A
Universal Encryption Standard
for Satellite Cable Programming

ORDER EXTENDING DEADLINE FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: May 23, 1989; Released: May 24, 1989

By the Chief, Office of Plans and Policy:

1. The Commission has received a "Request for an Extension of Time for Filing Comments" in the above-captioned proceeding. General Instrument Corporation (GIC) filed this request on May 18, 1989, asking for a two-week extension.

2. As a preliminary matter, it should be noted that the published text of the *Notice of Inquiry* in this proceeding (released April 14, 1989, FCC 89-104) contained an erroneous reply comment deadline. An Erratum was issued on April 18, 1989. That Erratum was incorrectly captioned General Docket No. 89-79. The correct docket number is General Docket No. 89-78.

3. Good cause for an extension having been shown, IT IS ORDERED that the deadeline for comments in General Docket No. 89-78 is extended to June 19, 1989 and the deadline for reply comments is extended to July 19, 1989. The reply comment deadline is extended in order to preserve the 30-day period originally allocated for review of comments in this proceeding by interested parties. The additional time for filing comments is granted on the basis that it will enhance the ability of commenters in general, and GIC in particular, to submit pleadings that include comprehensive analyses of the issues raised in the Commission's *Notice of Inquiry* in General Docket No. 89-78.

Action is taken pursuant to Section 4(i) of the Communications Act of 1934, as amended, under authority delegated to the Chief, Office of Plans and Policy by Section 0.271 of the Commission's Rules, 47 C.F.R. Section 0.271.

FEDERAL COMMUNICATIONS COMMISSION

John Haring
Chief, Office of Plans and Policy

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-136

In the Matter of

Amendment of Parts 2 and 21 of the Commission Rules and Regulations to Reallocate the Local Television Transmission Service from the 11.7-12.2 GHz Band to the 14.2-14.4 GHz Band. RM-5321

REPORT AND ORDER

Adopted: May 9, 1989; Released: June 1, 1989

By the Commission:

INTRODUCTION

1. By this action the Commission amends Parts 2 and 21 of the Rules to allocate frequencies for the local television transmission service (LTTS) in the 14.2-14.4 GHz band as proposed in the *Notice of Proposed Rule Making* (*Notice*) in this proceeding.[1] Existing LTTS operations in the 11.7-12.2 GHz band are being grandfathered.

BACKGROUND

2. The *Notice* in this proceeding was initiated to alleviate growing difficulties with operation of LTTS in the 11.7-12.2 GHz band.[2] LTTS operates in this band on a secondary basis to the fixed-satellite service (FSS). Specifically, the FSS uses the 11.7-12.2 GHz (11.7 GHz) band for satellite downlinks (space-to-Earth) and the 14.0-14.5 GHz (14.0 GHz) band for satellite uplinks (Earth-to-space). [3] In the past few years a new type of satellite service has begun to develop using very small aperture terminals (VSATs) for video and data transmission networks. For example, VSATs are beginning to be used by nationwide retail chains for communications between the main office and each store. The Commission recognized that it would be impractical to license each VSAT terminal individually since the number of terminals in any one network can run into the hundreds or thousands. Therefore the Commission established a blanket licensing policy for VSAT networks.[4] Under this policy, VSAT licensees are required to maintain an up-to-date list of earth-stations and to provide a point-of-contact to enable LTTS operators to coordinate their operations. The LTTS licensee is required to inform the point-of-contact prior to commencing any transmission.

3. In the *Notice*, the Commission stated that this coordination procedure could become increasingly burdensome as VSAT networks grow. Further, as VSATs proliferate it will become increasingly difficult for LTTS to use the 11.7 GHz band without causing interference to FSS operations, sharply curtailing use of the band for LTTS. It appeared that these problems could be eliminated by shifting LTTS operations from the satellite downlink band at 11.7 GHz to the satellite uplink band at 14.0 GHz. The risk of interference to satellite uplinks would be minimal due to the separation distance between LTTS operations on the earth and satellite receivers located in geostationary orbit.

4. The Commission noted, however, that parts of the fixed-satellite service uplink band at 14.0-14.5 GHz are also allocated for other services. Specifically, the 14.0-14.2 GHz band is allocated on a primary basis for radionavigation for both government and non-Government use. The 14.4-14.5 GHz band is allocated on a secondary basis for Government mobile operations. Because LTTS did not appear capable of sharing frequencies with radionavigation or mobile operations without significant risk of interference, the *Notice* proposed a secondary allocation for LTTS only in the 14.2-14.4 GHz band. The proposal called for LTTS operations in the 11.7 GHz band to cease within three years of the effective date of the rule changes. While this proposal would reduce the size of the allocation from five hundred to two hundred megahertz, the Commission believed that the new spectrum would be more useful due to the improved compatibility between the two services.

5. Comments on the *Notice* were filed by FSS interests, LTTS operators, and equipment manufacturers. A list of the commenters can be found in Appendix A. The issues raised by the commenters are discussed below.

. DISCUSSION AND DECISIONS

6. LTTS operators all support the proposed new allocation at 14.2-14.4 GHz. However, most LTTS operators, including the Ameritech Operating Companies (Ameritech), Centel Videopath, Inc. (Videopath), the NYNEX Telephone Companies (NYNEX) and Telehop Microwave Telecommunications (Telehop) are opposed to deletion of the existing allocation at 11.7 GHz. Pacific Bell and Nevada Bell (the Pacific Companies) filed joint comments stating that the 11.7 GHz band is already virtually unusable for LTTS and they have no objection to deletion of the 11.7 GHz LTTS allocation.[5]

7. LTTS interests raise several arguments for maintaining the 11.7 GHz secondary allocation for LTTS. Videopath and Telehop state that coordination with FSS has not been a problem in the past and future growth in the FSS is speculative.[6] On the other hand, while NYNEX opposes deletion of the 11.7 GHz allocation for LTTS, NYNEX points out that it took four days of continuous coordination effort to obtain a clear 11.7 GHz channel to cover the April 1987 running of the Boston Marathon and similar difficulties were experienced in connection with the July 1986 Liberty Weekend.[7] Several LTTS operators assert that frequency coordination is not burdensome for FSS operators and is an appropriate measure to ensure optimum spectrum utilization.[8] According to LTTS operators, some form of frequency coordination would still be necessary in the 14.0 GHz band in order to avoid interference from satellite earth station transmitters to LTTS receivers.[9] LTTS operators also express concern about whether manufacturers would produce suitable equipment in a timely manner and at reasonable cost.[10]

Videopath and Western Union emphasize that deletion of the 11.7 GHz allocation would make existing equipment costing $100,000 and $600,000, respectively, obsolete.

8. Ameritech is concerned about the proposed reduction in the amount of spectrum from five hundred megahertz to two hundred megahertz. This concern stems in part from the fact that the Commission recently made the 6.4 GHz LTTS band also available to other eligibles on a primary basis.[11] Other LTTS commenters express similar concerns.

9. FSS interests and microwave equipment manufacturers all support the proposal. Several parties describe FSS facilities, including VSAT networks, that are either already in place or are under construction.[12] These parties point out that because of the number of earth station terminals involved, the fact that many terminals are transportable and that operating schedules are uncertain, it is difficult to maintain an up-to-date list of all operations. Several FSS interests point out that because LTTS operations must often be established on short notice to respond to news events, LTTS operators may dispense with frequency coordination and risk creating interference to FSS receivers.[13] Moreover, they contend that the primary users of the band should not have to bear any burden to support secondary operations that share the band.

10. FSS interests argue that no frequency coordination would be required with LTTS operations in the proposed new 14.2-14.4 GHz band. They maintain that the risk of interference from LTTS transmitters to FSS receivers on satellites can be made minimal provided that appropriate technical standards are established. They argue that LTTS operators can avoid receiving interference by monitoring frequencies before using them and by using frequency agile equipment. They also claim that the risk of interference to LTTS receivers is minimal because FSS transmitters on the earth will be pointed upwards towards the geostationary arc while LTTS equipment operates line-of-sight along the ground.

11. Schlumberger states that in comparing the amounts of the existing and the proposed allocations it is important to keep in mind that the existing usable spectrum is much reduced following coordination with the FSS. Moreover, Schlumberger asserts that the new spectrum provides ten channels for video, and based on the Commission's records for July 1, 1986 to June 30, 1987, the 11.7 GHz band was used 72 times by LTTS systems and at no time were more than five channels required in any operating area.[14] LTTS equipment manufacturers M/A-Com Telecommunications, Inc. and Microwave Radio Corporation (MRC) support the proposal. MRC states that frequency agile equipment is already available in the 13.20-13.25 GHz bands for mobile video for the broadcast auxiliary and cable television relay services, and similar equipment could be made available for the proposed new 14.2-14.4 GHz band.

12. In reply to the comments of the FSS interests, the LTTS operators state that monitoring for vacant frequencies and use of frequency agile equipment is not an adequate replacement for frequency coordination. They maintain that added delay and expense would be involved in monitoring for a vacant frequency. Further, since FSS transmissions may be sporadic, monitoring provides no assurance that LTTS transmissions will not be interrupted by interference. They also argue that since LTTS receivers are often located atop high buildings there is risk that FSS earth stations will be pointed towards LTTS receivers.

13. We have carefully reviewed the comments and conclude that the proposed new secondary allocation for LTTS at 14.2-14.4 GHz is in the public interest. We believe that the new two hundred megahertz of spectrum at 14.2-14.4 GHz will be more useful for LTTS than the current five hundred megahertz at 11.7-12.2 MHz.[15] While five hundred megahertz of spectrum was allocated for LTTS, only part of this spectrum can be used due to potential interference to the FSS. The new spectrum will provide ten new channels, all of which are usable. Based on the record of recent LTTS use in this band, it appears that ten channels should be adequate. We therefore believe the new allocation will fully satisfy the present and future needs of LTTS.[16]

14. We remain convinced that there is no need to establish frequency coordination procedures for secondary use of the 14.2-14.4 GHz band by LTTS. By establishing appropriate technical standards, as discussed below, the risk of interference to FSS receivers in geostationary orbit will be minimal. With regard to potential interference to LTTS operations, we also believe the risk is minimal. We believe that monitoring frequencies before using them and using frequency agile equipment are generally effective measures to avoid interference. In light of these factors, and the fact that LTTS operation in the band is secondary, we find that frequency coordination in the 14.2-14.4 GHz band is unwarranted.

15. With regard to continued use of the 11.7 GHz band by LTTS, we note that FSS interests generally favor reducing the proposed cut-off from three years to eighteen months. LTTS interests generally favor either grandfathering all existing equipment or allowing continued use for ten years. LTTS interests point out that new equipment for the 14.2-14.4 GHz band will have to be developed.

16. We recognize that LTTS operators have made a substantial investment in existing 11.7 GHz equipment. Since LTTS operates in the 11.7 GHz band on a secondary basis, we will permit existing equipment to use this band indefinitely. However, in accordance with LTTS's secondary status, if interference is caused to the fixed satellite service, the LTTS operator shall either immediately remedy the interference or cease operation. We are retaining the requirement for VSAT operators to maintain an up-to-date list of earth stations and to provide a point-of-contact to facilitate coordination of secondary LTTS operations. We believe this requirement is warranted to enable LTTS operators to avoid causing interference to the FSS. Moreover, the requirement is a minimal burden since VSAT operators would normally keep track of their operations in the routine course of business.

17. In the *Notice*, we proposed to restrict the effective isotropic radiated power (EIRP) for LTTS to +45 dBW in the 14 GHz band, consistent with requirements in the international Radio Regulations pertaining to interference protection of satellite stations in the geostationary arc. Hughes Communications claims that the power limitation that we proposed in the NPRM is greater than the maximum EIRP associated with many of the VSAT networks currently being considered and recommends a maximum power limit of +15 dBW. Conus Communications Inc. (Conus) recommends that no terrestrial signal be permitted within 5 degrees of the direction of the geostationary arc and that the power be limited to +35

dBW elsewhere. GTE Spacenet recommends 41 dBW if LTTS avoids the geostationary arc by 10 degrees at all times (or 45 dBW and 15 degrees).

18. We note that there is substantial disagreement on what technical standards are appropriate to protect FSS receivers on satellites. Reducing LTTS power as suggested by some commenters would reduce the range of LTTS operations. Moreover, if the LTTS transmitter is pointed directly at the satellite there is still a possibility of interference even with a power reduced from our proposal. Nevertheless, this possibility appears remote given that LTTS operations are relatively few in number and both FSS and LTTS operations are highly directional. We note that the international *Radio Regulations* specify that, in the mobile service, sites for transmitting stations employing maximum values of equivalent isotropic radiated power (EIRP) exceeding +45 dBW should be selected so that the direction of maximum radiation of any antenna will be at least 1.5 degrees away from the geostationary orbit, taking into account the effect of atmospheric refraction.[17] This has served as an international standard for terrestrial radiocommunications sharing frequency bands with space radiocommunications. As a compromise, we are establishing a limit of +45 dBW and a pointing restriction of 1.5 degrees. While the international standard does not impose a pointing restriction at a power level of +45 dBW, we are persuaded that a pointing restriction will provide a measure of added protection against interference.[18]

19. The proposal also stated that all other technical requirements applied presently to LTTS in the 11.7 GHz band would be similarly applied in the 14.2-14.4 GHz band. This would permit LTTS to take advantage of existing channel bandwidths used in the 11.7 GHz band. No comments were filed on this issue and we are adopting this proposal.

20. Conus requests blanket authority for each licensee of a 14 GHz video satellite uplink to use the 14.2-14.4 GHz band, on a secondary basis, for terrestrial transmission of video signals. According to Conus, this would allow operators of video uplinks to feed material to and from satellite facilities with a reduced risk of interference and would relieve the burden on broadcast auxiliary frequencies. GTE Spacenet on reply objects to the Conus request saying that the proposal is beyond the scope on this proceeding. We agree that this issue was not contemplated in our proposal and is beyond the scope of this proceeding.

FINAL REGULATORY FLEXIBILITY ANALYSIS

21. The Commission is adopting this *Report and Order* to implement the allocation of the the 14.2-14.4 GHz band to the local television transmission service (LTTS). No comments were received that specifically addressed the Initial Regulatory Flexibility Analysis incorporated into our Notice pursuant to 5 U.S.C. section 603. This action will have a favorable impact on the LTTS by making frequencies available at 14 GHz that will replace 11.7 GHz frequencies that are becoming less useful for LTTS. Also, we expect this action will eventually eliminate the need for the FSS to maintain records at 11.7 GHz for coordination with the LTTR.

22. The only alternative to this action suggested by the commenters is to grandfather LTTS in the 11.7-12.2 GHz band. We have implemented this suggestion for the reasons given above. Specifically, there is a substantial investment in existing 11.7 GHz that warrants continued use on a secondary basis.

PAPERWORK REDUCTION ACT STATEMENT

23. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new information collection requirement on the public.

ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, that pursuant to the authority of Sections 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i), 301, and 303(r), Parts 2 and 21 of the Commission's Rules, ARE AMENDED as set forth in appendix B below.

25. IT IS FURTHER ORDERED that this Order will become effective **July 17, 1989.**

26. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The Following Parties Filed Comments in This Proceeding:

American Petroleum Institute

Ameritech Operating Companies

Andrew Corporation

Conus Communications Company Limited Partnership

GTE Spacenet Corporation

Home Box Office, Inc.

Hughs Communications, Inc.

M/A COM Telecommunications, Inc.

Microwave Radio Corporation

NYNEX Telephone Companies

Pacific Bell and Nevada Bell

Schlumberger Technology Corporation, Inc.

The Southland Corporation

TeleHop Microwave Telecommunications

Vitalink Satellite, Inc.

Wal-Mart Stores, Inc.

The Following Parties Filed Reply Comments in This Proceeding:

Ameritech Operating Company
Centel Videopath, Inc.
Communications Satellite Corporation
GTE Spacenet Corporation
Home Box Office, Inc.
NYNEX Telephone Companies
Schlumberger Technology Corporation
The Southland Corporation
Wal-Mart Stores, Inc.
Western Union Telegraph Company

APPENDIX B

RULE CHANGES

Parts 2 and 21 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

2. Section 2.106, the Table of Frequency Allocations, is amended by revising columns 4, 5 and 6 in the table for the 14.2-14.4 GHz bands to read as follows:

Section 2.106 ***Table of Frequency Allocations***

UNITED STATES TABLE		
		FCC USE DESIGNATORS
GOVERNMENT	NON-GOVERNMENT	
ALLOCATION GHz	ALLOCATION GHz	RULE PART(s)
(4)	(5)	(6)
14.2-14.3	FIXED-SATELLITE (Earth-to-space)	SATELLITE COMMUNICATIONS (25)
	Mobile except Aeronautical mobile	DOMESTIC PUBLIC FIXED (21)
US287	US287	
14.3-14.4	14.3-14.4 FIXED-SATELLITE (Earth-to-space)	SATELLITE COMMUNICATIONS (25)
	Mobile except aeronautical mobile	DOMESTIC PUBLIC FIXED (21)
US287	US287	

* * * * *

B. PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

3. The authority citation for Part 21 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303.

4. Section 21.801(a) is amended by revising the list of available frequencies for assignment to television pickup and television non-broadcast pickup stations in the local television transmission service to read as follows:

6,425 to 6,525 MHz [6]
11,700 to 12,200 MHz [3]
13,200 to 13,250 MHz [1]
14,200 to 14,400 MHz [5]
21,200 to 22,000 MHz [1,2,4,5]
22,000 to 23,600 MHz [1,2,5]
31,000 to 31,300 MHz [7]

5/ The maximum power for the local television transmission service in the 14.2-14.4 GHz band is +45 dBW except that operations are not permitted within 1.5 degrees of the geostationary orbit.

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, Gen. Docket No. 87-136, 2 FCC Rcd 2920 (1987).

[2] LTTS also is allocated spectrum in the 6.425-6.525 (6.4), 13.200-13.250 (13), and 21.2-23.6 (21) GHz bands.

[3] *See* the Table of Frequency Allocations in Section 2.106 of the Commission's Rules, 47 CFR 2.106.

[4] *See Order and Authorization*, Mimeo No. 4658, released June 7, 1984, In the Matter of Applications of Schlumberger Technology Corporation. This action authorized 500 earth-stations under a blanket license. Similar authorizations have since been applied for or granted to other parties. *See* also *Licensing of Small Antenna Earth Stations*, Mimeo 3588, released April 9, 1986, where the Commission clarified the coordination process.

[5] Also, LTTS user CBS supported the proposed reallocation.

[6] *See* Videopath comments at 5; Telehop comments at 3; and, Western Union reply comments at 2.

[7] *See* NYNEX comments at 3.

[8] *See* , for example, Videopath comments at 5-7.

[9] *See* Ameritech comments at 4; NYNEX comments at 6; and Pacific Companies comments at 3.

[10] *See*, for example, Telehop comments at 3. Telehop states that sales representatives of three major equipment manufacturers advised they would not produce equipment for the new 14.0 GHz band.

[11] *See Third Report and Order*, General Docket No. 82-334, 2 FCC Rcd 1050 (1987). *See also Memorandum Opinion and Order*, General Docket No. 82-334, 2 FCC Rcd 6750 (1987). Ameritech points out that it operates almost exclusively in the 6.4 GHz LTTS band. Ameritech is concerned that if the 6.4 GHz band becomes congested it will have to rely on other LTTS bands.

[12] *See* American Petroleum Institute (API) comments at 4 describing the oil and gas industries' use of FSS stations for oil and gas exploration, refining and distribution. API suggests that VSATs may be used for communication with retail gasoline outlets to transmit daily receipts, inventory control information and credit verification. *See* also HBO comments at 2 describing its plans to construct several thousand earth stations at 11.7/14.0 GHz for video distribution; Schlumberger comments at 2 describing its FSS system used for oil exploration using 500 transportable terminals and 50 fixed terminals; Southland comments at 2 outlining its system of 8000 terminals to transmit inventory and other data, one-way video, and digitized voice between Southland headquarters and other corporate facilities, including retail outlets; and Wal--Mart Stores Inc. reply comments at 1 describing its planned system of 2000 earth stations and up to 78 transportable earth stations.

[13] Schlumberger maintains that up to the time its comments were filed no LTTS licensee has ever sought coordination with the Schlumberger contact point. *See* Schlumberger comments at 4.

[14] Schlumberger comments at 5.

[15] Schlumberger suggested that the 14.0-14.2 and 14.4-14.5 MHz segments of the FSS uplink band might be usable for LTTS. *See* Schlumberger reply comments at 5. However, Schlumberger does not explain how LTTS operations could be coordinated with mobile operations in these bands.

[16] We are unpersuaded that the Commission's action to expand eligibility in the 6424-6525 MHz band will result in LTTS operators having increased needs to operated in other LTTS bands. This decision to expand eligibility was predicated in part on the observation that additional mobile video services could be accommodated in the band. *See Third Report and Order* and *Memorandum Opinion and Order*, General Docket No. 82-334, *supra*.

[17] *See* international Radio Regulations, article 27, at paragraph 2503.

[18] The current power limitation for LTTS is 10 watts, although it is often the practice of the Commission to limit LTTS operations to 5 watts (45 dBW). *See* FCC Rules sections 21.803 and 21.107(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-114

In the Matter of

Petition for adoption of a new
Section 68.314(h) of the
Commission's Rules.

NOTICE OF PROPOSED RULE MAKING

Adopted: May 11, 1989; Released: June 1, 1989

By the Commission:

INTRODUCTION

1. By this Notice we propose to amend Part 68 of the Commission's Rules and Regulations. 47 C.F.R. Part 68. Part 68 governs the terms and conditions for connection of customer provided terminal equipment to the telephone network. Part 68 is designed to assure consumers, manufacturers and carriers that terminal equipment may be connected to the telephone network without causing harm.[1] This proceeding was initiated by a petition for Rule Making filed by the American Telephone and Telegraph Company (AT&T) that proposes to add a new subsection (h) to Section 68.314, currently entitled "Billing Protection". The purpose of the proposal is to assure that customers placing direct-inward-dialing (DID) calls to stations behind private branch exchanges (PBXs)[2] are properly billed. AT&T also requests that the Commission assign compliance responsibility to manufacturers and suppliers. AT&T urges that adoption of its proposal would alert all suppliers that providing equipment that does not properly return answer supervision[3] is prohibited, and that such equipment would not be registrable under Part 68. According to AT&T, after it implemented procedures for detecting toll fraud, it discovered numerous cases where PBXs had failed to return answer supervision signals to telephone company equipment to indicate that DID calls had been completed. The failure of equipment to return answer supervision denies telephone companies tens of millions of dollars annually, AT&T claims. Public notice of AT&T's petition elicited comments by eleven parties[4] and replies by seven.[5]

2. AT&T explains that existing Section 68.314 applies only to network configurations in which the local exchange carrier (LEC) central office powers the called station. Under these configurations, answer supervision is returned when the called party lifts the telephone handset, which closes the circuit between the caller and the central office, causing current in the central office line. This current alerts the telephone company of a billable call and activates billing accounting equipment. Where the PBX is between the central office and the called station, however, the PBX provides continuous power to the central office and to the stations behind it. In this configuration, the PBX must "notify" the central office of the answered call. Industry standards require that PBXs reverse the polarity of the line to the serving central office in order to alert the central office that the DID call has been completed. According to AT&T, its investigations indicate that this does not always happen, which means calls are completed without billing equipment activation.

3. AT&T observes that because today's PBXs are software-controlled, they may be programmed not to return answer supervision, or to return answer supervision for certain kinds of calls and not others. Although some PBX dealers or customers may themselves program PBXs not to return proper signalling in some or all circumstances, generally, AT&T states, customers unknowingly install improperly optioned PBXs.

4. AT&T states that industry standards addressing answer supervision are not adequate to deter these practices because there is no enforcement mechanism. Moreover, it further states, telephone company tariffs are ineffective because they do not prevent this "faulty" equipment from entering the market. The failure of CPE to return answer supervision is a case of harm Part 68 is designed to avert, it argues. Section 68.3(g) defines "harms" to include "malfunction of telephone company billing equipment." AT&T Petition, p. 2.

AT& T's PROPOSAL

5. According to AT&T, a PBX may route a call to nine different types of stations. Of these, six require answer supervision. AT&T contends answer supervision should be returned when a call reaches:

(1) the called station,

(2) an attendant,

(3) a vacant code (an unassigned number generally equipped with a taped message),[6]

(4) a dialing prompt (a tone or message which instructs the caller to enter a code to further advance in the called party telecommunications system),

(5) a uniform call distributor (a feature that queues calls for distribution and often includes promotional messages during the holding period), and

(6) a PBX and is forwarded from the PBX to the public switched network.[7] AT&T does not advocate answer supervision when a destination line is busy, the call is forwarded from one PBX station to another on the called party's network, or there is a reorder signal.[8]

6. AT&T proposes a new Section 68.314(h), entitled "Operating Requirements for Direct-Inward-Dialing (DID)," to be applicable to calls to DID locations. The proposed rule is intended to require return of answer supervision in the six cases cited above and to place the responsibility of compliance, including proper PBX programming, on the PBX manufacturer and supplier. AT&T contends that PBX manufacturers can option their equipment in a way that would make modification very difficult. It believes that adoption of its proposal would alert all suppliers that selling equipment which does not return answer supervision is prohibited, and that equipment not

in compliance will not be registered under Part 68 of the Commission's Rules. In addition, its adoption would give carriers an additional legal basis for collecting their charges when they find non-complying equipment.

7. AT&T argues that its proposed rule should encompass both new and registered, in-service equipment. Owners of such equipment, however, would be given a short period to bring their equipment into compliance with the requirements of the new rule, with up to a year allowed in extraordinary cases.

RULE JUSTIFICATION

8. *Comments.* Of the eleven parties filing comments, two contend that AT&T's proposed rules are "premature." US West and NATA believe that the issues AT&T raises would be more appropriately addressed by industry standards, or in consultation with affected members of the CPE industry. US West notes that AT&T has not demonstrated that industry standards have been ineffective and that grant of AT&T's petition would preempt current industry standards activities. US West also states that AT&T's main concern is receiving answer supervision from calls terminated on "unassigned numbers." This matter, it states, currently is under consideration by two different standard setting bodies: Exchange Carriers Standards Association T1 Committee T1C1.1 and Electronic Industries Association (EIA) Committee T1-41.1. US West also argues that the proposed rules would be ineffective because, as AT&T admits, PBXs can be easily and economically reprogrammed by suppliers and customers. For its part, NATA observes that the equipment about which AT&T complains is legally registered and complies with all appropriate standards. At no time during the registration process did AT&T complain, it notes. It argues that AT&T has not provided sufficient evidence of a problem to warrant Commission intrusion into the matter, and believes AT&T should have documented its estimated revenue losses and given some measure of the extent of the problem based on the number of DID calls answer supervision was not returned compared to the total number of DID calls. In NATA's view, the problem is one that eventually will be resolved by the marketplace as more telephone companies implement toll fraud detection schemes, customers become aware of the problem, and equipment manufacturers, from fear of losing business, modify their equipment to properly return answer supervision. If this is not the case, NATA asks that AT&T explain why the incentives of the telephone companies and equipment manufacturers will not converge to eliminate or reduce the problem to a level negating a regulatory solution.

9. In its reply, AT&T states that equipment failure is a form of harm contemplated by Part 68 of the rules, and that this matter is appropriate for consideration by the Commission. AT&T argues that although there are industry standards which require return of answer supervision in specific instances, these standards have not deterred billing losses. Further, the proposed rules are drafted to address situations that did not exist in 1979, when industry standards were adopted. AT&T also points out that US West is mistaken when it states AT&T has not brought this matter before industry committees. It contends that in 1987 it presented standards to the T1C1.1 working group paralleling those in its petition. The matter was also raised with the EIA T1-41.1 Committee. The EIA Committee, AT&T states, included qualifying language in its current draft revision of EIA Standard RS-464, but because its discovery of delinquent DID answer supervision occurred after the draft was nearly finalized, it has not sought to introduce a major new subject.

10. According to AT&T, industry standards tell the industry how to implement Commission policies and rules technically but they have no enforcement mechanism. AT&T also asks which of the two committees will produce the industry standard. Moreover, in some cases, it notes, one must look at standards other than those of the T1C1 or T1-41 to interpret basic industry standards. Therefore, AT&T feels a Commission rule that resolves differences in industry standards, consolidates the various parts of its rules and provides an enforcement mechanism, will protect telephone customers far more effectively than industry standards. AT&T also argues that such action will be consistent with the purpose of Part 68.

11. AT&T also argues that relying on market forces is not an effective way of dealing with the problem. It states that some manufacturers and suppliers looking for a competitive edge tell customers that their equipment can save money because it does not always return answer supervision. Nor does its toll fraud detection process detect all cases of toll avoidance, AT&T notes. According to AT&T, "[s]elf interest can motivate customers, and their equipment suppliers, to devise equipment which will avoid much toll billing." AT&T Reply, p. 10.

12. According to BellSouth, industry standards are useful for defining CPE quality and operational parameters when harm to the network is not an issue; by their nature, industry standards are voluntary and unenforceable. BellSouth argues that when harm to the network is at issue, the enforcement powers of the Commission are essential to assure compliance.

13. US West and NATA's reliance on market forces is misplaced, argues BellSouth. Customers and manufacturers will react only after carriers have invested time, money and effort in fraud detection schemes. This is a costly and time consuming measure which increases carriers' revenue losses. Therefore, BellSouth rejects the idea that market forces are effective in dealing with the problem.

14. Those supporting AT&T's proposal reason that it is within the ambit of Part 68. They point out that Part 68 is designed to protect the telephone network from harms caused by CPE, and it is well settled that harm includes malfunctioning telephone company billing equipment. *See* Section 68.3. These parties claim that the absence of proper answer supervision causes telephone company billing equipment to malfunction because it does not properly register a billable call.[9] Some of the commenters note that carriers lose revenue when CPE fails to return the appropriate signal on completed DID calls. They argue that these losses include unbilled toll charges for interLATA, intraLATA and local measured service calls, loss of compensation for billing and collecting services performed for interexchanges carriers (IXCs), and the return of coin at pay stations on sent-paid calls. In addition, there is an intangible cost associated with customer dissatisfaction resulting from the use of toll fraud detection procedures, they state. This, they feel, is a burden on other ratepayers, who ultimately bear the cost of fraud.[10] To improve carriers' ability to collect revenue and to prevent or deter its loss, *i.e.*, to prevent harm to the network, supporters of AT&T's petition ask the Commis-

sion to require that CPE equipment be programmed to return proper answer supervision on completed DID calls.

15. *Discussion*. Part 68 dictates the terms and conditions for connection of customer provided terminal equipment and wiring to the telephone network. It is designed to assure consumers, manufacturers and carriers that terminal equipment may be connected to the telephone network without causing harm. Section 68.3(g) defines harm as

> Electrical hazards to telephone company personnel, damage to telephone equipment, malfunction of telephone company billing equipment, and degradation of service to persons other than the user of the subject terminal equipment, his calling or called party.

The focus of AT&T's petition is on the malfunctioning of telephone companies' billing equipment. In CC Docket No. 79-143, 76 FCC 2d 246 (1980), the Commission addressed the issue of whether billing errors caused by improperly installed or maintained automatic identified outward dialing (AIOD) CPE constituted a network harm. Miscoded AIOD station codes can cause incorrect customer billing, it was shown. The Commission stated that:

> A customer's statement might include calls not placed, exclude calls made, or misassign calls within a PBX. We believe that either of the first two of these types of erroneous billing constitute a "malfunction" of the telephone company billing equipment and thus "harm" within the meaning of Part 68.

76 FCC 2d at 264. The Commission also has stated that Part 68 is the most effective means by which to implement standards to prevent network harm:

> It appears that Part 68 network harm standards will constitute an efficient and effective means of ensuring that terminal equipment connected to . . . services will not cause network harm. The Part 68 registration program assures uniformity of harm standards,. . . and ease of enforcement through the application process and registration procedures.[11]

16. AT&T's petition discloses that some CPE fails to return answer supervision on DID calls, preventing telephone company billing equipment from functioning properly. The revenue lost as a direct consequence of this kind of failure is reported to be substantial. While the record does not quantify the revenue lost, most commenters acknowledge that there is a serious problem that requires resolution.

17. Those recommending that we rely upon market forces and industry standards committees to resolve this problem fail to show that these means have been effective. Adherence to industry standards is voluntary and there is no mechanism for enforcement. Moreover, it is not clear that the market itself provides sufficient incentive for manufacturers or suppliers to develop compliant equipment. Reliance on these approaches could perpetuate the answer supervision problem and lead to increased costs later, when there will be wider distribution of offending CPE. These costs would have to be borne by the general ratepayers, a consequence inconsistent with our preferred approach that costs be borne by cost causative customers. The information submitted to date indicates that developing a rule solution to the answer supervision problem represents the appropriate response by this Commission, particularly in view of the Commission's treatment of similar issues in the past. Therefore, we propose to amend Part 68 of our rules to address this problem.

COMPLIANCE PROGRAM

18. *Comments*. As part of its proposal, AT&T asks that we require manufacturers and suppliers to reprogram and reregister embedded CPE to comply with the proposed rule, within three months of the rules' adoption. Also, it suggests that we require customers to reprogram their equipment within three months after receiving notification from manufacturers. Further, manufacturers and suppliers would provide LECs with a list of customers owning offending equipment. The proposal would allow LECs to give notice of faulty equipment to customers as well as pass judgment on customer showings of hardship.

19. BellSouth considers AT&T's suggestion to require retroactive application of its proposed rules to embedded PBXs to be inappropriate. It asserts that the proposal shifts the compliance responsibility from manufacturers and suppliers to the LECs. Besides, BellSouth argues, such a requirement does not belong in Part 68, which in its view is intended to set forth standards to ensure that CPE connected to the network causes no harm and not to impose procedures for monitoring and correcting noncompliance with those standards.[12] BellSouth maintains that should the Commission propose a registration requirement or retroactive compliance scheme, the burden should be placed on the original grantee/manufacturer, not intermediate suppliers or LECs. BellSouth explains that AT&T's proposal does not make a distinction between the original grantee and nonmanufacturer suppliers who are not Part 68 grantees.

20. BellSouth also contends that the proposed scheme would require LECs to become record keepers and central points of contact for customers whose CPE must be reprogrammed, as well as place LECs in the position of determining whether customers have justified continued use of non-complying equipment. BellSouth complains that LECs should not be made the monitors of embedded CPE, particularly since the IXCs would be the greatest beneficiaries of the proposal. Therefore, it concludes, any rule adopted should be prospective only.[13]

21. While agreeing with AT&T that manufacturers should be responsible for programming PBXs to provide answer supervision and programming them in a manner which cannot be modified by distributors or customers, GTE urges that this not be the case where there are vacant codes or calls are forwarded to the public switched network (PSN). It proposes instead that customers be allowed to decide when answer supervision should be returned in these cases, based on the content of the message for calls to vacant codes and whether the PSN returns a signal to the PBX in the case of forwarded calls. In GTE's view, the rule should make clear that the manufacturer has the burden of compliance and the design of a "near tamper proof" program.

22. For its part, US West opposes AT&T's proposed certification program. First, it questions the program's utility because owners can easily reprogram the devices. Second, it claims that the costs of administering the program would be great, because telephone companies would necessarily have to assign personnel to the project and develop practices and procedures to evaluate the received certificates.

23. NATA expresses doubt that the portion of AT&T's proposal which outlines a scheme for notifying users of the need to modify their CPE can be readily implemented. Moreover, NATA argues that the plan is not likely to be successful because it requires manufacturers and suppliers to notify customers of defects in their CPE, (*i. e.*, that their CPE is improperly programmed) and because manufacturers and suppliers would be required to provide a list of customers owning such devices to their competitors (i.e., the telephone companies). Finally, NATA believes that these issues should be addressed in an industry forum.

24. API complains that AT&T's proposed notification and certification procedures applicable to embedded equipment unnecessarily burden companies with multiple locations. It notes that there are existing sanctions for violations of Part 68; violators are subject to the penalty and forfeiture provisions of the Act. *See* 47 U.S.C. §§ 502 and 503. As an alternative, API proposes that the Commission require manufacturers and suppliers "to certify to the Commission that they have (1) notified all known customers and lessees using non-conforming equipment, (2) provided either modified software or instructions for reprogramming the software or modifying the hardware, and (3) advised these persons that the PBXs must be modified within three months of the receipt of the manufacturer's/supplier's notice". API Comments, p. 5.

25. UTC contends that the burdens on LECs created by AT&T's certification and notification proposals are far greater than the expected benefits. Instead, UTC believes that the Commission should require manufacturers and suppliers to notify their customers of the equipment faults and impose a requirement to reprogram their equipment upon notification from manufacturers. If customers are required by rule to modify their CPE and fail to do so, they become subject to forfeitures and other Commission sanctions, UTC argues. Finally, UTC opposes requiring PBX customers to demonstrate to LECs that they would incur extraordinary expenses to modify their equipment within the specified time frame. This would delegate LECs too much authority and would provide an opportunity for discrimination, UTC claims. Alternatively, UTC proposes that such customers be permitted to complain to the Commission that it would be too expensive to make the change or it would be technically impossible to implement.

26. AT&T disagrees with those complaining that the certification aspect of its proposal would be burdensome. AT&T explains that its proposal does not require LECs to give customers notice of non-complying equipment. It allows them to ask for customer certification strictly on a voluntary basis. Nor does AT&T believe that the manufacturer notification requirement gives LECs an advantage over manufacturers. AT&T argues that LECs would have to manage the program in a nondiscriminatory fashion, and LECs already know who their PBX customers are because they provide local trunks to these customers. For the same reasons, AT&T concludes that equipment manufacturers should not be reluctant to provide LECs with lists of customers using offending equipment. In any event, AT&T defers to these concerns by revising its proposal to delete the requirement that manufacturers notify LECs of offending equipment.

27. GTE agrees with AT&T's proposal to permit customers and suppliers up to three months to modify their equipment in accord with the proposed rules. It further suggests that, should the Commission adopt its proposed change to AT&T's proposed vacant code requirement (which requires answer supervision only if the customer utilizes the announcement for commercial purposes).[14] the Commission should give manufacturers a year from the effective date of the rule to change their generic programs and to modify their systems to prevent customers from programming their CPE not to return answer supervision. GTE believes this proposal allows quick compliance by in-place equipment and gives manufacturers adequate time to change their generic programs. In addition, GTE urges the Commission to make clear that AT&T's proposed rules would not apply to equipment connected to the network under the grandfathering rules. *See* Sections 68.3(c) and (d).

28. According to NATA, the three month period allotted for upgrading those PBXs with software driven answer supervision may not be enough. NATA notes that PBXs are delicate blends of hardware, firmware and software and often one cannot be altered without impacting the others. Thus, it would be difficult to establish a period for modification in a Rule Making proceeding. With respect to new equipment, NATA argues that adequate lead time is needed to permit manufacturers to incorporate into their products any new requirements to avoid adversely impacting current production schedules and delivery timetables.

29. UTC expresses the view that AT&T's timetables are unworkable and too vague. A more effective way to deal with the issue, it contends, would be to require embedded equipment to be reprogrammed by a specific date. This would avoid customers determining the date reprogramming must be completed if their CPE is manufactured by more than one firm. The final date for compliance would be based on the last day manufacturers are required to notify customers. In addition, UTC urges that the period in which to comply be six months instead of three months as proposed by AT&T. The additional time, it states, is needed because many of its members own hundreds of PBXs.

30. In response, AT&T cites its amendment to its proposal to exempt manufacturer discontinued (MD) equipment from the new rules in regard to intercept announcements, if the equipment complied with EIA Standard RS-464 when first installed. This modification, AT&T asserts, addresses the concerns expressed with respect to the three-month deadline. Further, this proposal eliminates the need for a protracted transitional period and for customers to demonstrate extraordinary expenses to receive additional time to comply with the rules. With respect to embedded equipment which is programmable, AT&T does not offer any modifications to its original proposal. It continues to propose that this equipment, including devices on the proposed MD equipment list,[15] whether registered or grandfathered, comply with the proposed rules within three months.

31. *Discussion.* The implementation of a program of certification and reregistration that applies to existing equipment as broadly disseminated as PBXs would appear to be, at best, a difficult process. Several parties suggest that AT&T's proposal cannot be implemented at all. No party addresses the merits of API's and UTC's proposals, which would involve notice and customer modification of existing devices. API, AT&T and UTC do not attempt to quantify what impact their proposals will have on carriers or on manufacturers or suppliers of offending embedded equipment. Further, they have not offered data concerning the amount of existing embedded equipment that would be subject to their proposals, or the costs associated with implementation. Moreover, it is not clear such programs are practical given the number of devices installed, resold or otherwise not known to original manufacturers or suppliers. The public interest requires that we balance the benefits likely from adoption of any proposal as it applies to embedded equipment against its costs. In this case, the benefits -- billing savings to the carriers and ultimately general ratepayers, purportedly in the millions of dollars -- are unchallenged, but the costs of implementation in terms of the burden on manufacturers, suppliers, consumers and carriers, while clearly substantial, are not available to us.[16] Moreover, given the lack of substantial support for retroactive application of any proposed rule, we cannot find that any of the cited proposals, as they apply to embedded equipment, have been justified.

32. Thus, we do not generally propose to require manufacturers and suppliers to reregister embedded equipment, reprogram equipment in the field, interrupt manufacturing production processes or notify customers regarding offending equipment. By pursuing this course, the Commission will be relying on existing enforcement mechanisms to resolve the problem of answer supervision for installed and in-the-field terminal equipment. We seek comment from interested parties on the costs and benefits of applying our proposal prospectively.

33. Even though we propose only prospective application of our rule, interested parties are requested to file costs and statistical data related to calls placed to embedded CPE equipment in order that we may further assess whether there is a compelling need that is not evident from the record before us to apply of our proposal retroactively.

34. On the other hand, AT&T's proposal to require compliance with an answer supervision technical standard as a condition of registration of new equipment appears to represent a minimal burden on manufacturers and suppliers and apparently no burden on users or customers. The marginal additional cost of requiring PBXs to provide suitable answer supervision does not, according to the record, seem substantial. While considerable opposition was expressed to applying parts of AT&T's proposal to embedded equipment, little opposition was expressed to applying the rule to new equipment. A prospective requirement would eventually solve the billing problem in the future for all carriers as well as all subscribers who otherwise must underwrite billing losses.

35. For the reasons discussed above, we propose to require implementation of the proposed rules one year after they have been adopted. [17] By pursuing this course, the Commission will be relying on existing technical, regulatory and legal enforcement mechanisms to resolve the problem of answer supervision for installed and in-the-field terminal equipment. Moreover, AT&T states that it will be systematically expanding its toll fraud process throughout its network, and other carriers state they also employ or will employ similar procedures.[18] Thus, if a carrier, using its new detection schemes discovers an offending piece of equipment, it may notify the customer of violation of tariffs and, if necessary, invoke appropriate regulatory or legal remedies. *See ,e.g.,* Section 68.108 of the rules.[19] We believe that over a period of time this process will uncover much of the offending embedded equipment, and, in conjunction with the proposed prospective registration requirement, will help solve the problem that caused AT&T to file its petition. We seek comment from interested parties on our proposed implementation schedule and proposed remedies.

UNIFORM DISTRIBUTION, UNASSIGNED AND FORWARDED CALLS

36. *Comments.* UTC contends that the rules AT&T proposes should be modified to exempt some calls. Under UTC's suggested modification, PBX DID calls routed to a recorded announcement which states that the number "is invalid, not in service, or not assigned" would be exempt from returning answer supervision. In these cases, UTC argues that the caller has not completed a call and has not received any substantive information from the called party. UTC would treat these calls as similar calls on the PSN are treated. For this reason, UTC asks that a section be appended to AT&T's proposed rules to exempt calls which are "routed to a recorded announcement stating 'number invalid, not in service or not assigned.'" UTC Comments, p. 4. GTE offers a similar recommendation. GTE Comments, p. 5.

37. AT&T agrees that an alternative rule is warranted, but only with respect to embedded equipment which cannot be readily modified to comply with the proposed rules. For this equipment, much of which is no longer manufactured or marketed, AT&T proposes that the Commission develop a MD list. Equipment on this list would not be required to return answer supervision on calls routed to intercept announcements meeting EIA Standard RS-464, as amplified by the Local Switching System General Requirements. AT&T proposes that all other equipment must comply, whether registered or grandfathered, if it can be easily modified.

38. GTE recommends that AT&T's proposal be modified to exempt answer supervision on calls to uniform call distribution arrangements, until such calls are answered by a message advising callers, are queued, or answered by an attendant. GTE notes that AT&T's proposal would require answer supervision even if such calls were only placed in queue. If callers receive no message and hang up before one is received, GTE argues, there should be no charge for such calls. In its view, callers have no way of knowing that calls are placed in queue until they hear the taped message. To remedy its concerns, GTE recommends that AT&T's proposed Section 68.314(h)(1)(iii) be revised to include the words: "and answered by a recorded announcement," and that a subsection (v) to be added to Section 68.314(h)(2), *viz.*, "(v) Unanswered while in a queue and returning ringback tone to the caller."

39. AT&T concurs with GTE that answer supervision should not be returned until an attendant answers or callers reach an announcement. It states that customers do not perceive a call as being answered unless they reach an attendant or a recorded announcement. According to

AT&T, its original proposal requiring answer supervision when a call is placed in queue was intended to address the case where customers expect that no announcement will be made but remain on the line thus tying up network facilities unnecessarily. AT&T believes billing should commence when queuing, *i.e.*, "protocol," starts. Nevertheless, it recognizes that there are many users who are not aware when their calls have been placed in queue and do not intentionally tie-up carriers' facilities. It therefore submits a revision to its proposal incorporating GTE's suggestion that does not require a signal until an attendant or message is received.

40. In response to AT&T's proposal concerning PBX-forwarded calls, GTE suggests that calls forwarded to the public switched network through the PBX should be treated as calls forwarded to private networks "and answer supervision (and disconnect) should be repeated by the PBX when received from the distant end." GTE Comments, p.7. According to GTE, proper engineering practice requires the PBX to repeat answer supervision, but if answer supervision is not returned on the outgoing group -- private or PSN -- GTE reasons that the logical default is to require the PBX to return answer supervision when the call is forwarded. However, because these are determinations and programming decisions that only the customer can make, they cannot be part of generic software. Thus, GTE would modify AT&T's proposed Section 68.314(h)(1)(vi) to read:

> Routed to the public switched network or to a private network on a call-forwarding basis by the PBX when the PBX receives answer supervision from the distant end. If the outgoing group does not return answer supervision, then the PBX shall return answer supervision when the call is initially forwarded to the outgoing trunk group. This programming is the customer's responsibility, although the manufacturer shall provide specific instructions to the customer on the requirements of this Section.

GTE Comments, p. 8.

41. *Discussion.* Section 68.314, Billing Protection, currently contains various provisions requiring that terminal equipment obey performance standards designed to assure that a central office can monitor both on-hook and off-hook states. This section does not now contain any provision regarding the return of answer supervision by CPE capable of handling DID calls. In its petition, AT&T identifies certain types of DID calls for which answer supervision should be returned to ensure proper billing.[20]

42. AT&T proposes rules to require answer supervision in response to DID calls placed, *inter alia*, in queue (Uniform Distribution Calls), routed to unassigned codes (with announcements) and those forwarded to the network by PBXs. With regard to Uniform Distribution Calls, AT&T's proposal would require return of a signal as soon as the call is placed in queue. GTE contends this is unfair, noting that the caller normally receives a ringback tone until a taped message answers the call. If the caller hangs up before hearing the message he or she would not expect to pay for the call. AT&T's modified proposal seems to address GTE's concern, *i.e.*, it makes no reference to calls in queue. We offer this modified proposal for comment.

43. As to calls routed to unassigned codes, GTE and UTC recommend that calls informing the caller that it has reached an "invalid number," "not in service," or "not assigned" message should not invoke billing. GTE recommends that customers have the responsibility for returning answer supervision for unassigned numbers, based on the content of the announcement message. UTC suggests that PBXs should not be required to return answer supervision in those cases where the calling party reaches a taped message which informs the party that the particular number is not assigned or not in service. Both argue that a caller using the PSN is not billed for similar calls and no justification has been advanced by AT&T as to why one should be charged for making a similar call through a PBX since the PBX merely relays the DID call to a destination station.

44. CPE, whether a simple telephone or a complex PBX, must send proper answer supervision to the central office when the called station goes off-hook, unless there is a network or station-generated inability to complete the call. An example of a station-generated incomplete call is the unassigned number. If the PBX customer is permitted to determine what constitutes an unassigned number, *e.g.*, the PBX customer programs the PBX to activate an advertisement or message containing alternate number information when a call for an unassigned number is received, the problem for which AT&T seeks a solution will be perpetuated. Unless GTE can demonstrate some public benefit flowing from its proposed modification to allow customers to determine whether answer supervision will be returned on certain calls for unassigned codes, we believe AT&T's suggestion, as modified by UTC to exempt only calls answered with the message "number is invalid," "not in service," or "not assigned," is most consistent with our rules and policies. By this modified proposal, future PBXs would contain unalterable messages that the PBX customer could only toggle, *i. e.*, turn on or off, with respect to a given line. Only those lines/messages would be permitted to avoid answer supervision. The customer could send any other prerecorded messages, but they would require answer supervision.

45. Call forwarding presents additional considerations. The network does not normally provide the intermediate, call forwarding PBX with answer supervision from the called party's side of the circuit, other than normal network signalling. Thus, the PBX cannot generally serve as a transparent medium for answer supervision to the calling party's central office. As a consequence a call from the originating station to the PBX may not invoke answer supervision and may not be billed. This does not affect billing for the forwarded call, however, because the destination station's central office will cause billing through network signalling to the PBX's central office. AT&T's rule proposal assumes that the originator's call is completed when the intervening PBX commences its call forwarding function. Therefore, AT&T would require answer supervision for all calls forwarded to the PSN even if the called station does not answer. GTE's modification would require the PBX to repeat the signal from the distant station, forwarding answer supervision where required.[21] Current technology, as reflected in a variety of off-the-shelf customer-provided coin telephones and modems, permits electronic recognition of network line status. Thus, unanswered ringing, busy or off hook status is readily identifiable with reasonable accuracy, permitting the call forwarding PBX to dispatch the appropriate an-

swer supervision toward the calling station. Perhaps application of this technology to PBX design, or some advanced signalling technique at the central office, is an answer to the problem as it relates to unanswered calls. A complication arises with respect to forwarded calls that reach an invalid or unassigned number recording. A default compromise would be to adopt a modified version of AT&T's proposal to require answer supervision for these calls. There is no information in the record to suggest the extent to which such a requirement would unfairly burden customers. We therefore invite interested parties to comment on this proposal, AT&T's proposal and on alternatives to the default compromise.

CONCLUSION

46. Ensuring that no CPE causes harm to the public switched network is a goal of the Commission's Part 68 registration program. The record demonstrates that carriers are experiencing difficulties with CPE failing to return proper answer supervision. The record, however, does not delineate the extent of the problem. Therefore, we propose a course of action which addresses the matter prospectively and anticipate that carriers' toll detecting efforts and technological attrition will resolve the problem with respect to installed and in-the-pipeline equipment. Our preliminary analysis supports our tentative conclusion that the proposed rule set forth in the Appendix imposes the least burden on the public and is likely to yield the most benefit to carriers and ratepayers. To the extent interested parties do not find these proposed rules fully responsive to the needs evinced by AT&T and the commenters, we ask that they offer alternative proposals. Such proposals should include supporting data.

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

47. *Reason for Action*. The Commission is issuing this Notice of Proposed Rule Making to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

48. *Objectives*. The objective of this Notice of Proposed Rule Making is to ensure that customer premises equipment will return answer supervision for proper billing on certain DID calls.

49. *Legal Basis*. The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq*.

50. *Description, potential impact and number of small entities affected*. The effects of the proposed rule will reduce telephone companies' efforts and expenses in recovering lost revenues arising from fraudulent DID calls, but is likely to increase minimally the production costs of some CPE manufacturers. No additional burdens are anticipated because manufacturers are already under an obligation to register their customer premises equipment.

51. *Recording, recordkeeping and other compliance requirements*: None.

52. *Federal rules which overlap, duplicate or conflict with the Commission's proposal:* None.

53. *Any significant alternatives minimizing impact on small entities and consistent with stated objective:* None.

54. *Comments are Solicited*. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this regulatory flexibility analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. 5 U.S.C. § 601, *et. seq*.

PAPERWORK REDUCTION ACT

55. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

EX PARTE PRESENTATIONS

56. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

57. The Secretary shall cause a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Notice to appear in the Federal Register.

58. In accordance with the applicable procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested parties may file comments on or before **July 24, 1989,** and reply comments on or before **August 8, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and provided that the Commission's reliance on such information is noted in the Report and Order.

59. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments provided that the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

60. Accordingly, pursuant to Sections 1, 4(i), 4(j), 201-205, 215, 218, 303(r), 313 and 412 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 215, 218, 303(r), 313, 412 and 5 U.S.C. § 553, NOTICE OF PROPOSED RULE MAKING IS PROVIDED to amend 47 C.F.R. Part 68 as indicated above.

61. IT IS ORDERED, that the Petition for Rule Making, RM-5945, filed by the American Telephone and Telegraph Company IS GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend Part 68 of the Commission's Rules and Regulations (Chapter I to Title 47 of the Code of Federal Regulations, Part 68), as follows:

1. The authority citation for Part 68 continues to read as follows:

Authority: Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082; (47 U.S.C. 154, 155, 303).

2. Section 68.314 will be amended by adding paragraph (h) to read as follows:

Section 68. 314 Billing Protection

* * * * *

(h) Operating Requirements for Direct-Inward-Dialing ("DID"). (1) Answer supervision for DID calls to stations connected to the telephone company network through a Private Branch Exchange or similar System ("PBX") shall be returned to the central office on all calls which are:

(i) Answered by the called DID station,

(ii) Answered by an attendant,

(iii) Routed to an announcement, except for "number invalid," "not in service," or "not assigned" recordings,

(iv) Routed to a dialing prompt, and

(v) Routed back to the public switched network by the PBX to "number invalid," "not in service," or "not assigned" recordings.

(2) DID calls which do not require the PBX to return answer supervision are those: (i) which are not routed back to the public switched network and, in addition, are:

(A) Unanswered, i.e., the called DID station receives a ring, but does not answer, or the DID station to which the call is forwarded receives a ring, but does not answer,

(B) Routed to a busy signal,

(C) Routed to a reorder signal,

(D) Routed to a recorded announcement stating "number invalid," "not in service," or "not assigned," and

(ii) which are routed back to the public switched network and, in addition are:

(A) Unanswered, i.e., the called DID station recieves a ring, but does not answer, or the DID station to which the call is forwarded receives a ring, but does not answer.

(B) Routed to a busy signal.

(C) Routed to a reorder signal.

(3) Answer supervision on DID calls shall be provided in accordance with industry engineering standards.

(4) PBX and PBX-like equipment manufactured one year from the effective date of subsection (h) shall comply with the subsection. PBX and PBX-like equipment of earlier manufacture shall comply with the subsection if newly installed on a customer's premises eighteen months from the effective date of the subsection or any time thereafter. Such equipment must be reregistered, if already registered but not compliant with subsection (h). Compliance with the subsection shall require that the equipment be designed so that it will return answer supervision in conformity with this rule in a manner which cannot be readily altered by software control or other user controlled medium.

(5) As used in this Section 68.314(h), "private branch exchange or similar system ("PBX")" means customer premises equipment, such as private branch exchanges, key equipment, multifunction systems, multiplexers, and any equipment for which adopted industry standard signalling is the standard mode for returning answer supervision.

FOOTNOTES

[1] For a history of Part 68, *see* Memorandum Opinion and Order in Docket Nos. 19528, 20774 and 21182, 70 F.C.C. 2d 1800 (1979).

[2] The term PBX, as used herein, includes all customer premises equipment (CPE), *i.e.*, key systems, multifunction systems, multiplexers, etc., which employ "reverse battery" for returning answer supervision. Reverse battery is a "method of loop signalling in which the direction of current in the loop is changed to convey on-hook and off-hook signals." IEEE Standard Dictionary of Electrical and Electronics Terms, Third Edition, p. 786.

[3] Answer supervision is the term telephone companies use to describe the signal which the called station (or other CPE) emits to tell the telephone companies' billing equipment that a call has been answered and billing should commence. AT&T Petition, p. 3.

[4] Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), American Petroleum Institute (API), BellSouth Corporation (BellSouth), GTE Service Corporation (GTE), US West, North American Telecommunications Association (NATA), Pacific Telesis (Pacific), Southwestern Bell Telephone Company (Southwestern Bell), United States Telephone Association (USTA) and Utilities Telecommunications Council (UTC).

[5] AT&T, BellSouth, GTE, Dash, Straus & Goodhue, Inc., Independent Data Communications Manufacturers Association, Inc. (IDCMA), NYNEX Telephone Companies (NYNEX) and Southwestern Bell.

[6] AT&T describes a vacant code as "a term which describes a PBX line to which the customer has not assigned a number . . . or has not assigned the number to a specific employee or office." AT&T Petition, pp. 8-9.

[7] Call forwarding describes the process where a party calls a PBX station and the PBX station directs that call, by placing another, to a different location.

[8] A reorder signal informs the caller that the call cannot be completed.

[9] Ameritech Comments, p.2; Bell Atlantic Comments, p.1; BellSouth Comments, 4; and USTA Comments, p.2.

[10] Ameritech Comments, p.2; Bell Atlantic Comments, p.1; BellSouth Comments, 4; and USTA Comments, p.2.

[11] Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus of the Telephone Network, CC Docket No. 81-216, 49 Fed. Reg. 48714 (Dec. 14, 1984) at para. 20.

[12] This view is shared by Southwestern Bell and USTA. USTA states that the expense associated with any LEC's role may not be offset by the collection of the unbilled calls.

[13] USTA supports BellSouth in this view.

[14] *See* paragraphs 35, 36 and 42, *infra*.

[15] *See* paragraph 36, *infra*.

[16] The cost, we note, would effectively be capped if we apply AT&T's proposal only to future equipment registered under Part 68 because no new, non-compliant PBXs would enter the marketplace and the number of defective PBXs would fall through technological attrition and fraud detection activities.

[17] The one year requirement is called a "grandfather date." This means that we propose that one year from the effective date of the proposed new requirement, all newly manufactured PBXs must be registered in compliance with all Part 68 standards, including the answer supervision requirement. We also propose for PBXs of earlier manufacture a "register only date" of eighteen months after the effective date of the new rule. By this date, we propose that all such PBXs not previously installed on a customer's premises, *e.g.*, those in storage or awaiting shipment even if previously registered, will be subject to the new rule. Thus, if we adopt our proposal, any newly connected PBX will have to comply with the answer supervision requirement eighteen months after the effective date of the new rule. A similar approach has been used for the registration and connection of terminal equipment, PBXs and key telephone systems to the PSN and private line services. *See* Section 68.2.

[18] Toll fraud detection is used to reveal a variety of billing anamolies, not just PBX software problems. Relying upon such techniques exclusively to solve the problem underlying AT&T's petition is inadvisable because detection may take many months, or longer, during which time revenues are lost.

[19] This section requires that should terminal equipment or protective circuitry cause harm to the telephone network, the telephone company shall, where practicable, notify the customer that temporary discontinuance of service may be required; however, where prior notice is not practicable, the telephone company may temporarily discontinue service forthwith, if such action is reasonable in the circumstances. Furthermore, in case of such temporary discontinuance, the telephone company shall (a) promptly notify the customer of such temporary discontinuance, (b) afford the customer the opportunity to correct the situation which gave rise to the temporary discontinuance, and (c) inform the customer of his right to bring a complaint to the Commission pursuant to the procedures set forth in Subpart E of Part 68. *See* First Report and Order, Docket No. 19528, 56 FCC 2d 593, 612 (1975).

[20] NYNEX recommends that any rule that purports to specify how answer supervision should be provided ought to be drafted in more general terms. (AT&T's proposed Section 68.314(h)(3) reads: "Answer supervision on DID calls shall be provided by reversing the battery and ground connections on the tip and ring circuits." AT&T Petition, Appendix.) NYNEX claims that telecommunications technology is rapidly changing and answer supervision technology is likely to change as well. To adopt a narrow rule, in its view, would require continuous rule revisions as technology advances. NYNEX Reply, pp. 4-5. We believe that NYNEX's point is a valid one and merits consideration. The telephone industry has experienced many technological changes over the years and the future promises to be no different. Accordingly, we modify AT&T's proposal to conform with NYNEX's recommendation.

[21] This proposal seems to suffer the same fault that it proposed to address calls to unassigned numbers, *i.e.*, the PBX customer would have discretionary control over when answer supervision would be returned to the central office. *See* paragraph 43, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAN AMERICAN SATELLITE — FOIA Control No. 88-174

On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1989; **Released: June 1, 1989**

By the Commission:

1. The Commission has under consideration an "Application for Review of Freedom of Information Action" filed November 18, 1988, by Pan American Satellite (PAS). PAS seeks review and release of a single document previously withheld by a November 9, 1988, initial decision by the Chief, Common Carrier Bureau (Bureau Decision). On December 5, 1988, Communications Satellite Corporation (Comsat) filed an opposition to the Application for Review.[1]

BACKGROUND

2. The document in question was prepared by the International Telecommunications Satellite Organization (INTELSAT), dated September 12, 1988, and entitled "Estimated Cost of INTELSAT VI Transmission Paths: Theory and Application." Comsat submitted the document to the Commission, the Department of State and the National Telecommunications Information Agency (NTIA) under an express claim of confidentiality. As the designated representative of the U.S. Government to INTELSAT, Comsat presents the views of the Government to that body and presents INTELSAT's positions to the Government. The submittal was made as part of the intergovernmental instructional process by which Comsat is advised as to the positions to be advanced with respect to its role as the United States Signatory to INTELSAT.

3. PAS sought access to the document under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. By letter of November 9, 1988, the Chief, Common Carrier Bureau denied access, holding that it was protected under Exemption 4 of the FOIA. 5 U.S.C. § 552(b)(4). The Bureau Decision articulates that Exemption 4 shields from compulsory disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Commercial or financial materials are considered to be confidential when disclosure would be likely to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause the submitter substantial competitive harm. *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks I*).

4. The Bureau concluded that the document was protected under the first prong of the *National Parks I* test in that it was voluntarily submitted to the Commission. Although the Bureau noted that it would have directed Comsat to file the document if it had not been submitted voluntarily, the Bureau found that disclosure would most likely cause Comsat and INTELSAT to become reluctant to provide such material on a voluntary basis in the future.

5. The Bureau also found that the document was exempt from mandatory disclosure under the second prong of *National Parks I*. Here, the Bureau noted that there existed a potential for competition with INTELSAT, and, although the document did not contain specific dollar estimates or financial scenarios, release could enable competitors to tailor their own competitive strategies at the earliest possible time. Finally, the Bureau considered that Congress directed the Government to disclose information regarding INTELSAT revenues and costs "to the maximum extent possible." Foreign Relations Authorizations Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 146(c)(2)(B), 99 Stat. 425 (1985). However, it determined that the congressional intent did not require the release of this document.

6. In its Application for Review, PAS argues that release of the document would not impair the Government's ability to obtain similar information in the future. PAS notes that the Bureau indicated that it would have directed Comsat to file the document, and the Commission could obtain similar information in fulfilling its statutory oversight of Comsat's investment decisions and tariffs. PAS contends that, if the document does not deal with the cost basis of INTELSAT rates, release would result in little competitive harm.

7. On the other hand, PAS asserts that if the document is of some competitive significance, it must relate to how INTELSAT sets its rates. In this case, PAS argues that the document is a necessary link in a chain of evidence to determine the reasonableness of INTELSAT rates and the Comsat application to participate in the construction of five INTELSAT VII satellites. Thus, according to PAS, the document contains the type of information that Congress directed should be released "to the maximum extent possible." Pub. L. No. 99-93, *supra*, § 146(c)(2).

DISCUSSION

8. Initially, we agree that the Bureau properly found that Exemption 4 shields the requested document from mandatory disclosure under the FOIA. 5 U.S.C. § 552(b)(4). Although the Bureau could have directed Comsat to file the subject document, the need to require submission of such information would make Comsat and INTELSAT reluctant to supply it and thereby delay the instructional process.[2] *Critical Mass Energy Project v. NRC*, 644 F. Supp. 344, 347 (D.D.C. 1986); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.29 (D.C. Cir. 1983). Similarly, although the document does not contain specific dollar amounts or financial scenarios relating to specific costs or particular rates, release of a detailed exposition of proposed costing methodology would enable competitors to tailor their own competitive strategies. Thus, the document is protected under both prongs of the *National Parks I* test in that disclosure would impair the Government's ability to obtain the information in the future and cause the submitter substantial competitive harm. *National Parks I*, *supra*.

9. Nor has PAS made an adequate showing that the public interest benefits of disclosure would outweigh the benefits of nondisclosure. PAS contends that the document represents the type of information regarding INTELSAT revenues and costs that Congress contemplated should be made available to interested parties "to the maximum extent possible." Foreign Relations Authorizations Act of 1985, Pub. L. No. 99-93, § 146(c)(2)(A) and (B).

10. The legislative history of section 146 of the Foreign Relations Act of 1985, however, indicates that Congress was concerned with the possibility of significant economic harm to INTELSAT in a competitive international telecommunications marketplace. 131 Cong. Rec. No. 104, H 6678, July 30, 1985. Congress therefore evinced an intention to permit INTELSAT to "price competitively and fairly, provided that INTELSAT has adopted measures to ensure prices are cost based and not predatory, including the release of information on revenues, costs and allocation of such costs." *Id.* at H 6679. In this context, we believe Congress intended that specific information on particular costs should be made available to interested parties like PAS so that the basis of INTELSAT's pricing could be reviewed. We do not find that Congress had in mind that more general preliminary planning papers should also be released.

11. Nor is disclosure of the document necessary to achievement of the Commission's regulatory oversight of Comsat. The document does not constitute a "link in the chain of evidence" in any matter currently before the Commission.[3] Whether Comsat's rates are just and reasonable is a question to be addressed in tariff proceedings, during which the public will have a full opportunity to review and comment upon any relevant cost data submitted by Comsat. In this regard, we also note that the document sought by PAS does not necessarily contain the same type of cost support data that would be required to be submitted in tariff proceedings. Accordingly, we do not believe it is necessary to disclose the document in question. *See Western Union Telegraph Company*, FCC 85-378, released July 23, 1985.

CONCLUSION

12. In view of the foregoing, the Application for Review filed on behalf of Pan American Satellite IS DENIED. Pan American Satellite may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The Officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] PAS also sought expedited consideration of its Application for Review so that the document would be made available before the commencement of the INTELSAT Board of Governors meeting on December 8, 1988. By letter of November 29, 1988, the General Counsel denied the request for expedition, noting that under section 0.461(h)(4) the document could not be made available prior to the Board of Governors meeting.

[2] The release of the document might also make INTELSAT reluctant to share internal documents with COMSAT in the future.

[3] *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978). PAS alludes to a pending Comsat application to participate in the construction of five INTELSAT VII satellites, but it does not explain how release of this document, relating to the estimated economic costs of INTELSAT VI transmission paths, would aid it in commenting on the INTELSAT VII application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rock Hill Telephone Company and
Home Telephone Company

The Chester Telephone Company

Requests for Temporary Waiver of
the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1989 **Released: May 31, 1989**

By the Chief, Common Carrier Bureau:

1. In the *ITC Equal Access Order*,[1] the Commission addressed, among other things, the matter of whether the non-GTE independent telephone companies (ITCs) should be required to convert their end offices to equal access according to a fixed timetable. Such timetables had been imposed upon the Bell Operating Companies (BOCs) under the *MFJ*,[2] and upon the GTE operating companies (GTOCs) under the *GTE Consent Decree*.[3] The Commission found that the timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the ITC sector in light of certain characteristics of these carriers, including: (1) the variability of installed stored-program-controlled (SPC) equipment types in end offices; (2) the predominance of electromechanical equipment; (3) the existence of more severe constraints on capital spending; and (4) the likelihood that demand for equal access by customers and other common carriers (OCCs) alike would be less.[4]

2. Instead, the Commission established a general three-year timetable for ITCs to convert end offices equipped with SPC switches. This time period begins to run once a reasonable request for conversion to equal access is received from an OCC. End offices with electromechanical switches are not subject to a specific timetable, but are to be converted as soon as practical.[5] Moreover, the *ITC Equal Access Order* contemplates that in certain situations, circumstances may warrant conversion more slowly than the three-year timetable, or in other instances more rapidly.[6] Thus, the Order includes a waiver provision for those ITCs that "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[7]

3. On December 5, 1988, Rock Hill Telephone Company and Home Telephone Company (Rock Hill)[8] filed a request for a temporary waiver of the Commission's equal access conversion requirements[9]. The Chester Telephone Company (Chester)[10] also filed a request for a temporary waiver of the Commission's equal access implementation plan on December 13, 1988.[11] Both Rock Hill and Chester received requests for equal access conversions from the same interexchange carrier. Since these requests involve similar issues, we will consider them concurrently in this order.

4. Rock Hill received a request for equal access conversion from Telecommunications Systems Inc. (TSI)[12] on June 11, 1986, and states that it is required to complete the conversion within three years of the request date, which, in this case, would be June 11, 1989. Rock Hill seeks a temporary waiver of the Commission's requirements to allow it an additional 3 1/2 months, until September 30, 1989, to complete the conversion. Chester also received a request for equal access conversion from TSI on June 11, 1988.[13] Like Rock Hill, Chester is required to complete the conversion within 3 years, which would be June 11, 1989. Chester seeks an additional 7 months, until January 31, 1990, to complete the conversion.

5. Rock Hill states that the TSI request was the first of its nature that Rock Hill received. Rock Hill began planning for equal access implementation in its end offices after it received the TSI request. However, it recently became apparent to Rock Hill that its data storage requirements, following equal access conversion, will exceed the storage capacity of its existing disk drives because it must record terminating minutes for equal access.[14] Rock Hill is replacing the existing disks with larger capacity disks. These large capacity disks are a new product just recently made available by Rock Hill's switching system vendor. Rock Hill argues that since it will be among the first to use the new disks, additional time should be allowed for installation and testing. Rock Hill believes that the additional 3 1/2 months it requests will allow it to properly test the equipment to ensure a "trouble free conversion to equal access."[15] Rock Hill states that it notified SouthernNet, TSI's successor, of the delay. Rock Hill states that SouthernNet has agreed to the new completion date of September 30, 1989.[16]

6. Chester also states that the TSI request for conversion to equal access was the first of its nature that Chester received. Chester began planning for the equal access conversion when it received the TSI request. After analyzing the services required, Chester decided to use Northern Telecom DMS 100/200 equipment.[17] Chester's new equipment was installed by Northern Telecom on April 8, 1988. Chester believed that this was the "final step for equal access service."[18] However, during testing of the equipment, it became apparent to Chester that its personnel were not adequately trained to operate the associated operator services. Chester claims that it notified Northern Telecom of this problem, but Northern Telecom did not immediately respond to Chester's requests for technical assistance.[19] While awaiting a response from Northern Telecom, Chester learned that another company, using the same type of equipment arrangement, was experiencing difficulty in converting to equal access.

7. On November 16, 1988, Chester met with advisers from Northern Telecom to resolve the technical problems, and learned that additional software would be required. Northern Telecom informed Chester that the installation of new software should be completed by June, 1989. Chester states that due to these unforeseen developments, it will need additional time to test the equipment and input required translations "in order to provide com-

plete and reliable service."[20] Chester states that it notified SouthernNet, TSI's successor, of the delays, and that SouthernNet has stated that the delay is acceptable.

8. No parties filed comments on either of the temporary waiver requests. During the reply comment period, the United States Telephone Association (USTA) filed supporting statements urging the Commission to approve the requests for temporary waivers. USTA states that both Rock Hill and Chester have "demonstrated a sincere commitment to the provision of equal access."[21] USTA believes that the short delays will not inconvenience customers, and will permit Rock Hill and Chester to implement equal access services successfully.[22]

9. Based upon our review of the requests for temporary waiver filed by Rock Hill and Chester, and the supporting statements of USTA, we conclude that a grant of these requests is in the public interest. Unique circumstances beyond their control have contributed to the temporary delays experienced by Rock Hill and Chester in completing the equal access conversions. In addition, SouthernNet has agreed that the new completion dates are acceptable.

10. Accordingly, IT IS ORDERED that the petition of Rock Hill and Home Telephone Companies requesting a temporary waiver for three and one-half months of our equal access implementation requirements, is GRANTED.

11. IT IS FURTHER ORDERED that the petition of Chester Telephone Company seeking a temporary waiver for nine months of our equal access implementation requirements, is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE* Corp., 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at para. 47.

[5] Id. at paras. 48-49.

[6] See In the Matter of Petition of MCI Telecommunications and GTE Sprint Communications Regarding the Validity of Connecticut Statute and Decisions of the Connecticut Department of Public Utility Control Relating to Unauthorized Intrastate Traffic, 1 FCC Rcd 270 (1986), at paras. 34-39.

[7] *See ITS Equal Access Order* at para. 50.

[8] Rock Hill Telephone Company and Home Telphone Company are local exchange carriers and provide service in certain areas of South Carolina. Rock Hill Telephone Company and Home Telephone Company are affiliated carriers and jointly plan and implement new plant. Rock Hill claims that as of Nov. 30, 1988, it had 3,069 access lines and Home Telephone had 12,912 access lines. Rock Hill Petition at 1.

[9] In the Matter of the Rock Hill Telephone Company and Home Telephone Company Requests for Temporary Waiver of the Commission's Equal Access Implementation Plan for Independent Telephone Companies, December 5, 1988.

[10] Chester is a local exchange carrier and provides service in portions of Chester and Fairfield Counties, South Carolina. Chester claims that as of Nov. 30, 1988, it had 12,023 access lines.

[11] In the Matter of The Chester Telephone Company Request for Temporary Waiver of the Commission's Equal Access Implementatin Plan for Independent Telephone Companies, Dec. 13, 1988.

[12] Since TSI requested equal access conversions, TSI was purchased by SouthernNet.

[13] Chester Petition at 1.

[14] Rock Hill Petition at 2.

[15] *Id.* at 3.

[16] Rock Hill Petition at 3 and Appendix A.

[17] *Id.* at 2.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 3.

[21] USTA Supporting Statements at 2.

[22] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Sections 73.1211
("Broadcast of lottery information")
and 76.213 ("Lotteries") of the
Commission's Rules

REPORT AND ORDER

Adopted: April 25, 1989; Released: April 27 1989

By The Commission:

1. The broadcast of information concerning, or advertisements for, lotteries generally is prohibited by federal statute.[1] Exceptions to this prohibition exist for state conducted lotteries when the broadcast station is located in the state conducting the lottery or in an adjacent state that also conducts a lottery[2] and for certain types of fishing contests. [3]

2. On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act ("Act")[4], which establishes a National Indian Gaming Commission and permits the broadcast of certain Indian gaming information. The statute specifically provides that 18 U.S.C. Sections 1301-1304, "shall not apply to any gaming conducted by an Indian Tribe pursuant to this Act."[5] Therefore the broadcast of information about Indian gaming is permissible under many circumstances. We emphasize that such broadcasts are *not* permissible if the game does not qualify under federal law. In order to qualify, the game must (1) be conducted on Indian lands; (2) be owned by an Indian tribe or grandfathered pursuant to the statute; (3) be permitted by law in the state where it is held, and (4) in the case of "banking" games (*i. e.*, where participants play against the "house" instead of essentially against each other, such as blackjack, baccarat and chemin de fer or gaming machines, such as slot machines) the state and Indian Tribe have entered into a compact to permit such games and all requirements of that compact are met.

3. When enacting this statute, Congress noted that five states ban all gaming: Arkansas, Hawaii, Indiana, Mississippi and Utah. Broadcasters will be able to ascertain whether a particular Indian gaming activity is being conducted pursuant to the Act by contacting the National Indian Gaming Commission. In the period before the Indian Gaming Commission is established, the Office of the Solicitor in the Department of the Interior will provide information on whether particular games are in compliance with the Act. The phone number is (202) 343-9331.

4. Section 73.1211 of the Commission's Rules[6] prohibits the broadcast of most lottery information or advertisements, reflecting the restrictions of 18 U.S.C. Section 1301 *et seq.* prior to the change in federal law.[7] With the adoption of the Act, permitting the broadcast of information and advertisements pertaining to certain Indian gaming activities, it is no longer appropriate for the Commission to restrict such broadcasts. Accordingly, we will amend Section 73.1211, as set forth in the attached Appendix, to permit the broadcast of Indian gaming activities as authorized by the Act. This will bring the Commission's rules into conformity with the new statute.

5. Similarly, our cable television rules currently contain restrictions on the cablecast of lottery information when a cable system is engaged in origination cablecasting.[8] We also will amend that section, as indicated in the Appendix, to allow the cablecast of Indian gaming information to the same extent as authorized under the Act for broadcast.

6. We are promulgating these rules without prior public notice and comment because the rules merely restate and interpret the statute, and thus come within the interpretative rules exception of the Administrative Procedure Act.[9] This action also is within the good cause exception of the Administrative Procedure Act, which similarly permits the Commission to promulgate a rule without complying with the normal procedure when the agency finds that notice and comment are unnecessary.[10]

PAPERWORK REDUCTION STATEMENT

7. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirement; and will not increase or decrease burden hours imposed on the public.

ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, Parts 73 and 76 of the Commission Rules ARE AMENDED as set forth below.

9. Further information on this proceeding may be obtained by contacting Ellen J. Schned, Mass Media Bureau at (202) 632-3922.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 CFR Parts 73 and 76 are amended as follows:

1. The authority citation for Parts 73 and 76 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. In Section 73.1211 a new paragraph (c)(3) is added to read as follows:

73.1211 Broadcast of lottery information.

* * * * *

(c) * * *

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. §§2701 *et seq.*).

* * * * *

3. Section 76.213 is amended by revising paragraph (c) to read as follows:

76.213 Lotteries

* * * * *

(c) The provisions of paragraph (a) and (b) of this section shall not apply to advertisements or lists of prizes or information concerning:

(1) A lottery conducted by a State acting under the authority of State law when such information is transmitted:

(i) By a cable system located in that State.

(ii) By a cable system located in an adjacent State which also conducts such a lottery, or

(iii) By a cable system located in another State which is integrated with a cable system described in (c)(1)(i) or (ii) herein, if termination of the receipt of such transmission by the cable system in such other State would be technically infeasible.

(2) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act (25 U.S.C. §§2701 *et seq.*).

FOOTNOTES

[1] 18 U.S.C. Section 1304.

[2] 18 U.S.C. Section 1307(a)(2).

[3] 18 U.S.C. Section 1305. These exemptions will be significantly expanded when the Charity Games Advertising Clarification Act of 1988 (Pub. L. No. 100-625) is effective on May 7, 1990.

[4] Pub. L. No. 100-497, 102 Stat. 2467 (to be codified at 25 U.S.C. Section 2701 *et seq.*, effective October 17, 1988).

[5] 102 Stat. 2467 at 2486 (1988).

[6] 47 C.F.R. Section 73.1211.

[7] The Commission's rules also reflect the exemptions to the lottery broadcast restrictions that exist in federal law (18 U.S.C. Sections 1305 and 1307) by permitting the broadcast and cablecast of certain state conducted lotteries in states conducting the lotteries or in adjacent states that also conduct a lottery, and by permitting the broadcast of certain fishing contests (47 CFR Sections 73.1211(c) and 76.213(c)(d)).

[8] 47 C.F.R. Section 76.213.

[9] 5 U.S.C. Section 553(b)(A). *See Alcaraz* v. Block, 746 F. 2d 593 at 610- 614 (9th Cir. 1984).

[10] 5 U.S.C. Section 553(b)(B).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY Revisions to Tariff F.C.C. Nos. 1, 2, 11, 13, and 14 — Transmittal Nos. 1518 and 1519

ORDER

Adopted: March 30, 1989; Released: March 31, 1989

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) filed the above-captioned transmittals on February 15, 1989, proposing to reflect in its service rates changes in access costs resulting from the December 30, 1988, annual access tariff filings by the National Exchange Carrier Association and local exchange carriers (LECs). Transmittals 1518 and 1519 are scheduled to become effective April 1, 1989, except for certain proposed revisions contained in Transmittal 1519, which have effective dates of June 1, 1989, and July 1, 1989.

2. In Transmittal 1518, AT&T, proposes tariff revisions that would increase rates for its Local Channel private line services by $10.5 million on an annual basis. In Transmittal 1519, AT&T proposes rate level and rate structure revisions to its switched services designed to implement aggregate rate reductions of $539 million.[1] AT&T subsequently has sought permission to file additional rate reductions totalling $97 million.[2]

3. The proposed revisions to AT&T's switched services include: (1) non-uniform reductions totalling $160 million to domestic Message Telephone Service (MTS) rates, with increases in additional minute rates for short-haul bands, decreases in initial minute rates for all mileage bands, and 2 percent reductions in off-peak (evening and night/weekend) discounts; (2) new distance sensitive rate schedules for AT&T 800 Service, resulting in usage rate reductions of 0.6 percent to 3.1 percent; (3) 5.3 percent usage rate reductions for ReadyLine 800 service; and (4) reductions in monthly recurring charges for Megacom and Megacom 800 services from $870 to $50.

4. On March 2, 1989, ALC Communications Corporation (ALC), Competitive Telecommunications Association (Comptel), the Bell Atlantic Telephone Companies (Bell Atlantic), and the Ad Hoc Telecommunciations Users Committee (Ad Hoc) filed petitions variously seeking suspension, rejection, or investigation of Transmittal 1519.[3] Ad Hoc's petition also seeks investigation of Transmittal 1518. AT&T filed a reply to these petitions on March 13, 1989. On March 28, 1989, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition to reject Transmittal 1519, accompanied by a motion to accept late-filed pleadings.[4]

5. On March 28, 1989, AT&T filed an application to make further proposed revisions to its Tariff F.C.C. Nos. 1, 2, and 13, effective April 1, 1989, and July 1, 1989.[5] In particular, the AT&T application sought permission to file additional proposed rate reductions totalling $97 million for AT&T's MTS, International MTS (IMTS), and Reach Out America services. AT&T contends that these further proposed rate reductions are due to the additional access cost reductions resulting from the Bureau's *March 22 Order* disallowing certain costs filed by the LECs in their December 30, 1988, annual access tariff filings.[6] AT&T states that it proposes to flow through these additional cost savings entirely to MTS, IMTS, and Reach Out America, because the "price cap" plan, as announced at a Commission meeting on March 16, 1989, would appear to require that result as of July 1, 1989.[7] The Tariff Division granted AT&T permission to file these additional revisions in response to the AT&T application.[8] The transmittal implementing those changes will be filed March 31, 1989.

6. In their petitions, ALC, Comptel, Bell Atlantic, and NARUC each contend that AT&T proposes to flow through reductions in access costs in a manner that unfairly burdens users of less competitive services, particularly residential ratepayers.[9] These petitioners note that Transmittal 1519 would flow through only $160 million of the $539 million in total access cost reductions to basic MTS service, allocating the remaining $379 million in reduced access charges to AT&T's business services.[10] The petitioners argue that this tendency to favor business customers continues in AT&T's proposed MTS rates themselves. They complain that while access charges have decreased uniformly for all time periods, AT&T proposes larger MTS rate reductions for the daytime period, when business usage is relatively greater.[11] According to ALC and Comptel, this disparity renders the proposed rates unjust, unreasonable, and discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).[12] NARUC contends that this disparity violates the Commission's intent in ordering subscriber line charge increases.[13]

7. The petitioners also challenge AT&T's proposed allocation of access cost reductions among its business services. ALC and Comptel complain that AT&T proposes reductions averaging 5.3 percent for its ReadyLine 800 service, but much smaller reductions for traditional 800 Service.[14] ALC asserts that this disparity between the proposed rate reductions for 800 Service and ReadyLine 800 is inconsistent with the relative cost savings associated with each. This is so, according to ALC, because traditional 800 Service, which uses a common line only on the terminating end, should receive the undiluted benefit of reduced terminating carrier common line (CCL) charges, while ReadyLine 800, which uses a common line on both the originating and terminating ends, should receive only the net reduction in access costs resulting from the decline in terminating CCL charges and the *increase* in originating CCL rates.[15] ALC and Comptel both assert that AT&T's proposed pricing of 800 Service and ReadyLine 800 constitutes an unlawful attempt to subsidize the latter service, which they claim is subject to greater competition, with revenues from the former.[16]

8. Bell Atlantic contends that the Commission should suspend and investigate AT&T's proposed rate revisions for its Megacom and Megacom 800 services, because those revisions will encourage bypass of the public switched network.[17] In particular, Bell Atlantic challenges the proposed reduction in the monthly recurring charges for those services from $870 to $50. According to Bell Atlantic, this reduction in recurring charges will make it eco-

nomical for a WATS or 800 Service customer to switch to Megacom or Megacom 800 at only 12,000 minutes of use per month, while, as originally justified in 1985, the cross-over point for Megacom was 72,000 minutes of use.[18] In Bell Atlantic's view, this alleged bypass incentive which AT&T is offering its customers cannot be justified as a simple flow through of access cost reductions. Rather, Bell Atlantic argues, AT&T is proposing to use reductions in access charges for other services which utilize the public switched network to reduce its rates for these bypass services.[19]

9. ALC argues that AT&T has proposed disproportionate rate reductions for its optional calling plans (OCPs).[20] As a result, ALC asserts, AT&T has voided the results of the original net revenue tests which AT&T employed in justifying the introduction of its OCPs.[21] ALC contends that AT&T should be required to make *de novo* net revenue test showings in connection with its OCPs.[22]

10. Ad Hoc attacks Transmittals 1518 and 1519 on procedural grounds, arguing that AT&T has not complied with the cost support requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.[23] In particular, Ad Hoc asserts that AT&T has provided insufficient supporting data to verify its calculation of aggregate switched access cost reductions,[24] that AT&T has failed to include estimates of demand stimulation in calculating its anticipated access cost savings,[25] and that AT&T has provided no support for its claims that certain rate level and rate structure revisions are necessary to ensure that services cover their costs.[26] Ad Hoc also contends that the June 30, 1988, FDC report (covering 1987 costs) which AT&T used to support its filing is too stale to satisfy the requirement in Section 61.38 that the carrier provide a cost of service study.[27] In addition, Ad Hoc argues that AT&T's 1989 Interstate Financial View, which was used to calculate expense savings, is inadequate because it provides data only on AT&T's interstate operations as a whole, and does not provide disaggregated information for the carrier's private line and switched network services.[28]

11. The AT&T reply disputes the petitioners' claims that it has underallocated access cost reductions to MTS service. AT&T states that while the 30 cent subscriber line charge increase, as reflected in the LEC access tariff filings, operates to reduce AT&T's aggregate access costs, the confluence of other factors effective April 1, 1989, has an offsetting impact with respect to MTS.[29] In particular, AT&T contends that the Commission-mandated increase in the originating CCL charge from zero to one cent per minute effective April 1, has the effect of increasing access costs for services, such as MTS, that utilize originating switched access, and of reducing access costs for those services that use only terminating switched access.[30]

12. In addition, AT&T asserts, the concurrent change in Universal Service Fund (USF) cost recovery from a per-minute to a per-presubscribed line basis increases AT&T's total share of the USF burden, and attaches that cost recovery burden to services, such as MTS, which employ presubscribed lines.[31] Finally, AT&T contends that the effect of CCL depooling as of April 1, is to increase its access costs, since AT&T provides service disproportionately to high cost areas.[32] AT&T asserts that, given these offsetting cost factors, it has in fact proposed significantly greater benefits to MTS customers than would be warranted by the LECs' annual access tariff filings.[33]

13. Criticism of AT&T's decision to adopt greater reductions in MTS rates during the daytime period than in other periods are unfounded. AT&T states, because daytime reductions are necessary to prevent erosion of day MTS traffic volumes to competition.[34] AT&T explains that in the absence of daytime rate reductions, decreased day traffic would lead to pressure for higher evening and night/weekend rates in order to ensure recovery of fixed costs.[35]

14. AT&T disputes Bell Atlantic's claim that its rate reductions for Megacom and Megacom 800 will encourage uneconomic bypass. AT&T contends that these services are cross-elastic with offerings (AT&T WATS and AT&T 800 Service) that use "directly assigned" WATS access lines, and thus provide no contribution to non-traffic sensitive (NTS) cost recovery at the closed end of those services. As a result, AT&T claims, the demand shifts projected in connection with its Megacom and Megacom 800 rate revisions will have no impact on NTS recovery.[36] Moreover, AT&T asserts, the impact on demand for traffic sensitive (TS) access resulting from a shift to Megacom and Megacom 800 will be insignificant.[37]

15. AT&T also disputes ALC's claim that AT&T has proposed to flow access reductions disproportionately to its OCPs, resulting in OCP rates which would not satisfy a *de novo* application of the net revenue test. AT&T asserts that the only changes it has made to its OCPs – Reach Out America and AT&T Pro WATS I – are revisions to the basic MTS schedule upon which certain Reach Out America and Pro WATS I rates are based.[38] AT&T contends that it is no longer required to track and report net revenue results for Reach Out America, and that, with respect to Pro WATS I, the annualized effect of its proposed rate revisions is a reduction in revenues of only 5 percent.[39]

16. AT&T further rejects the claims of ALC and Comptel that its proposed rates for AT&T 800 Service and ReadyLine 800 service do not appropriately reflect the access cost savings attributable to each service. AT&T states that it has proposed changes to ReadyLine 800 rate levels and AT&T 800 rate levels and structure in order to ensure that usage rates for the two services will vary only on the basis of the access arrangement selected by the customer – *i.e.*, dedicated access for AT&T 800 Service, and switched access for ReadyLine 800.[40] AT&T states that offering the two services with an identical distance sensitive structure results in more understandable pricing for customers.[41]

17. Finally, AT&T disputes Ad Hoc's assertions that it did not furnish required cost data in connection with Transmittals 1518 and 1519. AT&T contends that it has fully complied with Section 61.38 of the Commission's Rules, by providing: (1) a description of the rate revisions and the basis for ratemaking for each rate change; (2) the demand changes and cross-elastic impact on its services of the proposed rate changes; (3) a description of the methods used to determine the financial effects of the proposed rates; and (4) cost projections.[42]

18. The Common Carrier Bureau has reviewed Transmittals 1518 and 1519, the associated pleadings, and AT&T's description of further rate revisions to reflect the additional access cost reductions required by the *March 22 Order*. We believe AT&T's proposal to flow $97 million in access cost reductions resulting from the *March 22 Order* entirely to MTS and other predominantly residential services should ameliorate the concerns expressed by peti-

tioners that Transmittal 1519 unfairly concentrates rate reductions in AT&T's business services. Moreover, viewed as a transitional step toward AT&T's initial price cap filing May 17, 1989, this allocation of cost reductions to residential services appears to be a tangible indication of the benefits residential ratepayers can expect to receive under the price cap regime, benefits they would not necessarily receive under allocation procedures traditionally applied under rate of return regulation.

19. We conclude that no compelling arguments have been presented that AT&T's proposed tariff revisions are so patently unlawful as to warrant rejection. We also conclude that no question has been presented that warrants investigation at this time. An investigation of the precise allocation of access cost savings among AT&T's services would not be useful in view of the Commission's decision to require AT&T to make a price cap filing on May 17, 1989, that will recalculate the impact of access cost changes pursuant to price cap principles.

20. IT IS THEREFORE ORDERED that the above-referenced petitions of ALC Communications Corporation, Competitive Telecommunications Association, the Bell Atlantic Telephone Companies, the Ad Hoc Telecommunications Users Committee, and the National Association of Regulatory Utility Commissioners against American Telephone and Telegraph Company Tariff F.C.C. Nos. 1, 2, 11, 13, and 14, Transmittals 1518 and 1519, ARE DENIED.

21. IT IS FURTHER ORDERED that the above-referenced motion to accept late filed petition of the National Association of Regulatory Utility Commissioners IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Description and Justification at 1. As originally filed, AT&T calculated access cost reductions of $533 million, but subsequently revised this figure upward to $539 million. *See* Letter from Administrator -- Rates and Tariffs, AT&T, to Secretary, FCC, Feb. 16, 1989.

[2] *See* paragraph 5, *infra*.

[3] ALC seeks rejection of Transmittal 1519. Comptel seeks rejection, or alternatively, suspension and investigation of the filing. Bell Atlantic seeks suspension and investigation of AT&T's proposed rate changes for Megacom and Megacom 800, and seeks investigation of the remaining revisions proposed in Transmittal 1519. Ad Hoc seeks only investigation of the filing.

[4] In its motion, NARUC contends that it meets only three times per year to set policy and adopt resolutions. In this instance, NARUC asserts, it met on March 1, 1989, and directed its General Counsel to prepare a petition opposing Transmittal 1519. NARUC contends that the process of coordinating a response with the staffs of its various member agencies rendered it impossible to file its petition in a timely manner. NARUC states that we should accept its late-filed petition, since it represents a class of interests -- state regulators -- that would not otherwise be represented. NARUC Motion at 1-2. Given the considerations raised by NARUC, we believe the public interest would be served by granting NARUC's motion in this instance. We therefore grant NARUC's motion.

[5] AT&T Application No. 526, Mar. 28, 1989.

[6] Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, DA 89-337, released Mar. 22, 1989 (*March 22 Order*).

[7] *See* FCC News Release, "Action In Docket Case: Commission Adopts Incentive Regulation for Dominant Carriers; AT&T Price Cap Plan To Take Effect in July; Further Comments Sought on LEC Price Cap Plan (CC Docket No. 87-313)," Mar. 16, 1989.

[8] Letter from Chief, Tariff Division, FCC, to Administrator -- Rates and Tariffs, AT&T, Mar. 28, 1989.

[9] ALC Petition at 1-2; Comptel Petition at 1; Bell Atlantic Petition at 1-2; NARUC Petition at 2-4. ALC, Comptel, and Ad Hoc claim generally that the Commission should give special scrutiny to AT&T's proposed rate revisions, because AT&T is attempting to position itself for the advent of price cap regulation, which, they assert, will be initiated based upon existing rates. ALC Petition at 2, 5-6; Comptel Petition at 3-4; Ad Hoc Petition at 3.

[10] *E.g.*, Comptel Petition at 2. *See also* Bell Atlantic Petition at 2-5.

[11] ALC Petition at 2-3; Comptel Petition at 2; Bell Atlantic Petition at 3 n.3; NARUC Petition at 2-4.

[12] ALC Petition at 3; Comptel Petition at 1-3.

[13] NARUC Petition at 3-4.

[14] ALC Petition at 3-4; Comptel Petition at 4-5.

[15] ALC Petition at 4.

[16] ALC Petition at 4; Comptel Petition at 4-5. ALC also complains that AT&T proposes to delay its "modest" rate decreases for traditional 800 Service until July 1, 1989, while implementing its larger price reductions for ReadyLine 800 effective April 1, 1989. ALC Petition at 3-4. ALC contends that since the access cost reductions for both services begin April 1, AT&T must be using the cost savings attributable to traditional 800 Service during the April through June period either to lower rates for other services, or to increase its own earnings. *Id.*

[17] Bell Atlantic Petition at 5-7.

[18] *Id.* at 6 & n.12.

[19] *Id.* at 7.

[20] ALC Petition at 6-9.

[21] *Id.* at 8.

[22] *Id.* at 8-9.

[23] Ad Hoc Petition at 1-10.

[24] *Id.* at 5-6.

[25] *Id.* at 6-7.

[26] *Id.* at 7-8 (citing AT&T's decision to increase additional minute rates for short-haul MTS traffic, and the tapered schedule for monthly recurring charges for AT&T's Multi-Location Calling Plan).

[27] *Id.* at 8-9.

[28] *Id.* at 9-10.

[29] AT&T Reply at 4-5.

[30] *Id.* at 5-6.

[31] *Id.* at 6-7.

[32] *Id.* at 7.

[33] *Id.* at 9 (stating that while its real access costs for domestic MTS have increased by $41 million, it proposes to allocate $160 million in access savings to that service).

[34] *Id.* at 12.

[35] *Id.*

[36] *Id.* at 13.

[37] *Id.* at 14 (asserting that the reduction in TS access demand resulting from its proposed Megacom and Megacom 800 rate revisions constitutes less than 0.3 percent of AT&T's total projected 1989 demand for TS access, and only 0.2 percent of the projected total industry TS access demand).

[38] *Id.* at 15. AT&T contends that inclusion of a state All Pro plan in its interstate Pro WATS service is not a revision to an OCP. According to AT&T, this feature applies only to its "seamless" Pro WATS service, which is an extension of the carrier's separately rated Custom Switched Network Service. *Id.* at 15 n.**.

[39] *Id.* at 15-16.

[40] *Id.* at 16-17.

[41] *Id.* at 17.

[42] *Id.* at 17-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications Equipment
and Services by the Hearing Impaired
and Other Disabled Persons

FIRST REPORT AND ORDER

Adopted: May 4, 1989; Released: May 11, 1989

By the Commission:

1. On August 17, 1988, the President signed into law the Hearing Aid Compatibility Act of 1988, Public Law 100-394 (HAC Act). The HAC Act requires all "essential" telephones[1] and nearly all telephones manufactured in or imported into this country after August 16, 1989, to be hearing aid compatible (HAC). The new law directs the Commission to "complete Rule Making actions required to implement the amendments made by the Hearing Aid Compatibility Act of 1988 within nine months after the date of enactment of such Act." HAC Act § 710(f). This Report and Order complies with that directive.

BACKGROUND

2. In response to the Telecommunications for the Disabled Act of 1982, Public Law 97-410, (Disabled Act) the Commission, on December 1, 1983, adopted rules designed to improve the availability of telecommunications equipment and services for the hearing impaired and other disabled persons.[2] These rules: (1) require telephones classified as "essential" to be internally compatible with hearing aids specially designed for telephone use;[3] (2) describe the technical standards hearing aid compatible telephones must meet; (3) require each telephone package to denote whether the telephone is hearing aid compatible; and (4) allow carriers to provide "specialized terminal equipment" to persons with hearing, sight, speech or mobility impairments, and permit state commissions to allow carriers to recover through tariffs "reasonable and prudent costs not charged directly to users of such equipment." During the 1982 Congressional hearings leading to the Disabled Act and in preliminary Commission proceedings,[4] it was evident that a segment of the U.S. population was having difficulty obtaining telecommunications services and equipment because of certain physical disabilities. This Commission believed the rules adopted in its further proceedings[5] would improve access to telecommunications services by these disabled persons. Subsequently, a number of parties presented arguments to the Commission suggesting that these rules were not adequate to accomplish their intended purpose. In response, the Commission initiated this docket to examine the effectiveness of the current rules, particularly in the wake of recent technological and other changes. On March 29, 1988, we issued a *Notice of Proposed Rule Making and Further Notice of Inquiry (Notice)*, CC Docket No. 87-124, 3 FCC Rcd 1982 (1988), proposing, among other things, specific rule changes that, if adopted, could increase the ability of the hearing impaired to access telephone services. We proposed to expand the definition of essential telephones to include all credit card-operated telephones and workplace telephones located in common areas likely to be used by hearing impaired employees. In the *Notice* we noted that Section 710(b) of the Disabled Act prohibited the Commission from requiring all telephones to be hearing aid compatible.[6] The Disabled Act also directed the Commission, in implementing the Act through regulations, to consider the costs and benefits to "all telephone users, including persons with and without hearing impairments" and to adopt rules that "encourage the use of currently available technology and do not discourage . . . the development of improved technology." 47 U.S.C. § 710(e).

3. After we released the *Notice*, the HAC Act was enacted. The HAC Act, with some limited exceptions, requires telephones manufactured in or imported into this country after August 16, 1989, to be HAC, and directs the Commission to adopt appropriate rules. On February 16, 1989, we issued a *Further Notice of Proposed Rule Making* (FNPRM) to comply with the instructions of Congress.[7] In our FNPRM, we concluded that the HAC Act eliminates the need for the Commission to expand the definition of "essential" telephones as was proposed in the *Notice*.[8] Our proposed rules were tailored to the HAC Act, providing generally that all telephones manufactured or imported after August 16, 1989 be hearing aid compatible, with some exceptions applying to telephones used with public mobile services, private radio services and cordless telephones.

COMMENTS AND DISCUSSION

4. *The Rules.* We initiated the FNPRM to comply with the instructions of Congress described in the HAC Act. In so doing, we proposed to amend Part 68 of the rules to require all essential telephones and all new telephones manufactured in or imported into this country after August 16, 1989, to be HAC, with the exception of telephones used in public mobile and private radio services, and those classified as secure telephones. In addition, following language of the HAC Act, we proposed that cordless telephones have a grace period of three years after the date of enactment of the HAC Act during which they need not comply with the HAC requirement. We also proposed that the exemptions for telephones used with public mobile and private radio services be periodically reviewed, as required by the HAC Act. We further noted that the HAC Act does not require any retrofitting of units manufactured or imported prior to August 17, 1989, and that it permits the sale of these telephones until stock is depleted.

5. During its deliberation of the HAC Act, Congress found that although it had acted earlier to improve hearing impaired persons' access to the telephone network, there are many telephones still inaccessible to the hearing impaired community. Under the Disabled Act, only telephones classified as "essential" are required to be HAC. Except for coin operated telephones, telephones are in this class by virtue of their location, *e.g.*, telephones in

hospital rooms and telephones at hearing impaired persons' work stations are essential. Congress pointed out that it is impossible to adequately define "essential telephones" to cover all possible situations in which hearing impaired persons may need access to a telephone. It stated:

> No matter how broadly the FCC defines "essential", it is impossible to specify in advance all the telephones that a hearing aid user might need. The travelling salespeople, repairmen and women, doctors, and others who make house calls or work outside of an office, for instance, often use telephones that would not be classified as "essential". . .
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> * * * * *
>
> Even if the FCC's rules theoretically covered all the potential situations in which a hearing aid user might need a HAC telephone, it is doubtful such rules could be enforced.

Senate Report at p. 3. To ameliorate the problem, Congress found it best to impose the responsibility for the HAC requirement on telephone manufacturers. It reasoned that this group has fewer members and has a better line of communication among its members. Congress found that migration to HAC telephones would occur naturally over time. Senate Report at p. 5.

6. BellSouth Corporation states that the proposed rules strike the appropriate balance among the interests reflected in the HAC Act and will enhance accessibility to telecommunications services by the hearing impaired. USTA supports the proposed rules, finding the FNPRM responds to the HAC Act. However, USTA offers some editorial suggestions designed, it claims, to focus on the telephone itself rather than communications services. More specifically, USTA suggests that the words:

> "telephone used with" be inserted immediately before the words "private radio services" in both proposed section 68.4(a)(1) and proposed section 68.4(a)(4). USTA suggests that a comma be inserted after the words "private radio services" in proposed section 68.4(a)(1). Finally, USTA suggests that the words "telephones used with" also be inserted immediately before the words "public mobile services" in proposed section 68.4(a)(4).

USTA Comments at p. 2.[9] In addition, USTA recommends that proposed Section 68.4(a)(3), which characterizes a hearing aid compatible telephone, use the language of the HAC Act's Section (b)(1). In the alternative, it suggests that the proposed section should be modified to indicate that Section 68.316 meets the statutory requirement. *Also see* GTE Comments at p. 3. We agree with these recommendations and, because these are editorial changes not affecting the substance of the rules, we will revise the language of the proposed rules to incorporate these suggestions. We also modify Section 68.4(a)(2) of the rules proposed in the FNPRM to conform with the existing Section 68.4 as it relates to coin-operated and hotel/motel telephones.

7. USTA concurs with the Commission's conclusion that the HAC Act eliminates the need for the Commission to expand the definition of "essential" telephones as proposed in the *Notice*. While AT&T also supports the proposed rules, it urges the Commission not to forsake the Commission's original proposal to expand the definition of "essential" telephones to include credit card and workplace telephones. It maintains that for a period of time manufacturers may supply these telephones from existing stock, which need not be HAC. The Commission's original proposal, it suggests, would at least ensure that telephones at these locations would be HAC regardless of their manufactured or importation date. NCLD-OUT agrees with AT&T, arguing that the Commission in the *Notice* [10] justified the proposed expansion because the benefits of compatible workplace telephones outweighed their cost.[11] It also states that Congress mandated that the Commission proceed with its earlier proposal, *citing* House Report No. 100-674 (100th Cong. 2d Sess.) at 3, 4 and 15; Senate Report No. 100-391 (100th Cong., 2d Sess.) at 2 and 3; and Public Law 100-394 §§ 2(1) and 2(4). NCLD-OUT also notes:

> Not only did Congress direct the FCC not to limit the above definition to telephones at an individual's workstation - and, by implication, to expand the definition of essential telephones in the workplace - but it specifically mandated the Commission to include in that definition *all* telephones operated by credit card. The failure of the FCC to complete its NPRM ignores this Congressional directive.

NCLD-OUT Comments at p.5.

8. In its reply comments, NATA agrees with the Commission's conclusion that the HAC Act removes the need to continue with the proposal to expand the definition of "essential" telephones to include credit card and workplace telephones. It explains that following AT&T's recommendation would lead to the expense and burden that Congress attempted to avoid by not imposing retrofitting requirements for existing telephones and allowing a year grace period for new telephones to meet the HAC standard. It further indicates that Congress did not define workplace telephones as "essential" because it recognized "the burdensomeness and difficulty of enforcing . . .. rules defining essential telephones by location instead of by type." NATA Reply at p. 3. Adopting AT&T's proposal, it states, would lead to unenforceable rules and a burden and expense of retrofitting not intended by Congress.

9. GTE contends that AT&T has mischaracterized the HAC Act. It explains that AT&T claims the new law narrows the definition of "essential" telephones. But, according to GTE, the HAC Act did not alter the definition of essential telephones, nor introduce any changes in the Disabled Act or the Commission's rules. Nevertheless, GTE agrees with AT&T that the new law did not expand the definition of "essential" telephones as proposed by the Commission in the *Notice*. Congress, it states, took a different approach, *i.e.*, enacting a law requiring virtually universal hearing aid compatibility for telephones. The

remaining question, according to GTE, is whether the Commission ought to expand the definition of "frequently needed" telephones while complying with the mandate of the HAC Act. GTE believes the Commission should not because the difference is marginal. Moreover, it notes, except for coin-operated and emergency telephones, the Commission is precluded from requiring retrofitting of telephones to achieve hearing aid compatibility. Therefore, already installed non-HAC credit card telephones "in stock" before August 17 would continue to be non-compatible. If AT&T's rule were adopted, such telephones would become surplus equipment and probably junked, argues GTE. In its view, the marginal increase in available HAC telephones does not justify discarding serviceable equipment, nor did Congress require such action, it concludes.

10. *Discussion*. In light of the action taken by Congress, expanding the definition of "essential" telephones to include workplace telephones in common areas appears unwarranted.[12] Moreover, the definition of common areas could not be sufficiently defined to cover all areas where the hearing impaired might need a telephone in the work environment. The ambiguity of the term could lead to challenges and could put the Commission in the position of being unable to enforce the requirement. Congress recognized the difficulty of enforcing rules of this nature. Thus, we will adopt Congress' approach to the overall problem of hearing aid users, *i.e.*, require nearly all telephones to be hearing compatible. As Congress noted, this scheme will not guarantee immediate universal hearing aid compatibility, but over time that goal will be realized.

11. We now turn to the issue of whether all credit card telephones should be included in the definition of "essential" telephones. Currently, credit card telephones must be hearing aid compatible "unless a hearing aid compatible coin-operated telephone providing similar services is nearby and readily available." 47 C.F.R. § 68.112(c)(1). Contrary to NCLD-OUT's view, the new law does not require that we expand the definition of "essential" telephones.[13] In fact, the applicable legislative history[14] is critical of the definitional approach to remedying the difficulties the hearing impaired encounter in using telephones. Moreover, the perceived unavailability of HAC credit card telephones does not appear to be as acute as NCLD-OUT implies. Our Part 68 records indicate that there are 16 registered series of credit card telephones that may be attached to the network. Of these, four do not contain a statement that they are HAC. This does not necessarily mean that all four of these units are, in fact, not HAC because some were registered prior to the adoption of our HAC standards and requirements. No evidence has been submitted regarding (1) how many credit card telephones are not hearing aid compatible, or (2), if any, how many have caused inconvenience to the hearing impaired. Thus, it is not apparent that there is a need to include all credit card telephones in the definition. Moreover, such inclusion would be inconsistent with that part of the HAC Act that allows manufacturers to deplete existing stocks of incompatible telephones.[15] Finally, because we have no record data concerning the size of the extant stock of incompatible credit card telephones, we cannot engage in the cost/benefit analysis required by the Disabled Act. 47 U.S.C. § 710(e). For these reasons we do not adopt AT&T's and NCLD-OUT's proposal to require all credit card telephones to be HAC immediately. We believe that, if there are such telephones, they will become HAC as they are replaced over time.

12. *Complex Equipment*. GTE expresses concern about the treatment of telephones used as components of complex devices, such as facsimile machines and private branch exchanges (PBXs). It believes that an assembly, i.e., a complex device, qualifies as a "telephone" under the Commission's proposed rules. It argues that if the complex device is assembled after August 16, 1989, but contains a non-HAC telephone manufactured prior to August 17, 1989, the entire device is exempt from the HAC Act. In other words, if a complex equipment manufacturer purchases non-HAC telephones manufactured or imported prior to August 17, 1989, the finally assembled device need not comply with the HAC Act to be sold. However, it states that such devices must continue to comply with Sections 68.112 (identifies locations where "essential" telephones, *i.e.*, HAC telephones, must be placed), 68.218 (details the responsibility of grantee of equipment registration) and 68.224 (requires grantee of equipment registration to provided notice of hearing aid-compatibility) of the rules.

13. *Discussion*. GTE's analysis that these devices would be treated as telephones under the rules is correct. Equity requires that we permit the incorporation of non-HAC telephone handsets in other telecommunications devices after August 17. It would be unfair to permit retail of non-HAC telephone handsets after that date as self-contained units and forbid their use in other products. Congress recognized that the supply of non-compatible telephones would not be exhausted by the effective date of the new law, and therefore provided for their retail until the stock is depleted. The requirements which apply to the handsets are equally applicable to the equipment in which handsets are incorporated. Congress placed no restraints on the use of these non-compatible devices, and the policy against retroactive application of the HAC requirement argues in favor of GTE's interpretation, except they may not be employed at sites where telephones are deemed "essential". *See* 47 U.S.C. § 710(b)(1)(A) and 47 C.F.R. § 68.112.

14. *Secure Telephones*. The HAC Act exempts "secure" telephones from the HAC requirement. The HAC Act defines "secure" telephones as "telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications." Section 710(b)(4)(D). AT&T requests that the Commission allow private customers to also use exempt secure telephones, stating that private customers may have a need for these telephones. It states that "secure telephones" do not generate an external magnetic field, "thus, it is infeasible for them to also provide a HAC capability." AT&T Comments at p. 5. In its view, because of their limited application, and approval by the U. S. Government, private use of these telephones would have little impact on the hearing impaired community.

15. In response to AT&T's request, GTE agrees with the results, but believes private use of these telephones is implicit in the HAC Act. It states that "[t]he law does not exempt such telephones only when 'used' by the Government, but merely requires that they be 'approved' by the Government for such use." Therefore, it concludes that private use of these telephones is already covered.

16. *Discussion*. The focus of the exemption is on telephones that are properly approved, independent of who actually uses them or where they are installed. Thus, for example, subsequent sale of Section 710(b)(4)(D) secure telephones in the surplus market would not convert them to HAC-subject telephones. Such telephones are designed not to contain fields susceptible to telecoil access. Therefore, their value after use in a secure environment would be reduced to zero were the exemption not to attach permanently. If Government-approved secure telephones are available to private users, we cannot conclude that they need be HAC, by the terms of the statute.[16] This, we believe, was not Congress' intent. Congress was concerned that there remain available telephones usable for conducting conversations for secure purposes. The resulting statutory provision does not affect private, lawful use of such telephones. We therefore do not find it necessary to amend the proposed rule. However, these telephones when marketed to private consumers must comply with Sections 68.112, 68.218 and 68.224. That is, they may not be used as "essential" telephones and their packaging must contain proper instructions regarding places of use and a notation that they are not HAC.

17. *Section 68. 316*. NCLD-OUT again requests the Commission to raise the minimum acceptable field strength of HAC telephones by at least six decibels. The basis for this request is outlined in comments NCLD-OUT submitted earlier in this proceeding.[17] NCLD-OUT claims that some telephones classified as HAC emit energy at a level sufficient to meet the legal standard but ineffective in fulfilling the needs of some hearing aid users. Both AT&T and GTE oppose NCLD-OUT's suggestion. They explain that no data are offered demonstrating that these standards are inadequate. They note that the standards were developed with the cooperation of the Hearing Industries Association, an organization of hearing aid manufacturers. To achieve true compatibility, they argue, requires standardization of the hearing aid design.

18. *Discussion*. In the *Notice* at p. 1989, where we discussed other means of improving the disabled's access to telecommunications services, we observed:

> There is little information on record concerning the hearing aid's role in these matters. It would certainly appear to play an integral role in the way the hearing impaired access telephone service. An assessment of how the quality of the hearing aid relates to the user's ability to access the telephone or use telephone services is required to determine what Commission action is appropriate. Further, it would be helpful to know if efforts are underway to standardize the hearing aid telecoil performance requirements, and the levels being proposed. . . .

Responses to this request provided no technical data demonstrating that our current standards are inadequate or indicating that the matter warrants further consideration. The record suggests that the range of hearing aids' performance levels continues to be extremely broad. Although the Senate Report does not address the issue, the House Report contains language which directs the Commission to maintain the current standards of Section 68.316. House Report at pp. 12 and 13. We therefore conclude that the current standards are adequate.

19. *Labelling*. Section 68.224 currently requires that telephone packaging contain a statement as to whether the telephone is HAC. AT&T urges the Commission to discontinue the telephone packaging labelling requirement. It feels that since the HAC Act requires nearly all telephones to be HAC, the labelling requirement of Section 68.224 is unnecessary, and its removal would reduce costs. AT&T notes, however, that should the Commission believe that labelling is needed, it should apply only to non-hearing aid compatible telephones. NCLD-OUT acknowledges the cost factor but opposes AT&T's proposal to eliminate the requirement at this time because it believes a large volume of possible non-compatible telephones will remain in the marketplace after the effective date of the new law and the Commission's rules. If adopted, it suggests, AT&T's proposal would deny consumers a means of determining whether a telephone is HAC. In the alternative, NCLD-OUT urges that the Commission retain the labelling requirement for at least three years.

20. *Discussion*. On the effective date of the HAC Act, there still will be a number of non-compatible telephones available for retail. We will continue to require that these telephones be labelled as non-HAC. AT&T requests that we discontinue the labelling requirement altogether. Without any labelling consumers would have no way of determining whether or which models are HAC. Over time, our new rules will bring about a virtually universal HAC environment, which means there will be few, if any, non-HAC telephones available for sale to the public. This tilts the cost/benefit analysis in favor of eliminating the labelling requirement for HAC telephones and to continuing to require the labelling only of non-HAC telephones. NCLD-OUT's proposal to remove the labelling requirement after three years would cause an unnecessary procedural complication. Instead, we believe reducing the HAC labelling requirement now, with implementation of our new rules, will at once reduce a regulatory burden, reduce unnecessary manufacturing costs and reflect the implicit expectation that a telephone purchased in the market place –unless otherwise noted on the packaging –is HAC. If we did not retain the packaging labelling requirement for non-compatible devices, the goal of the HAC Act that those persons with hearing impairments be afforded access to telephone service will be undermined. Therefore, we reject NCLD-OUT's proposal and adopt AT&T's alternative that only non-compatible telephones need comply with Section 68.224. *See* Appendix, amended Section 68.224.

21. *Refurbished Telephones*. In the FNPRM, we said refurbished telephones are not covered by the HAC Act. According to NCLD-OUT, the House Committee on Energy and Commerce authorized the Commission to impose HAC requirements on refurbished telephones. *See* House Report 100-674 at 12. Based on the nation's goal of universal telephone service, NCLD-OUT urges the Commission to require these telephones to be HAC whether or not they are HAC when submitted for refurbishment. Such a requirement, in its view, would serve the public interest. AT&T, however, concludes the Commission is correct in observing that the HAC Act does not apply to refurbished telephones. First, it indicates NCLD-OUT's reliance on the House Report is misplaced. AT&T relates "that the House Bill was adopted after it was amended to contain the text of the Senate Bill."[18] AT&T Reply at p. 2. Therefore, it argues, the Senate Report represents the legislative history of the act -- which provides no Commis-

sion authority to require refurbished telephones to be HAC. Second, it points to explicit language in the Senate Report and the Communications Act which excuses application of the new law to refurbished telephones. Senate Report at pp. 7-9 and 47 U.S.C. § 710(f). Even the House Report, AT&T explains, under its definition of refurbished telephones, would preclude application of the HAC Act in this instance. It states that "[t]o require that refurbished phones be made hearing aid compatible is to require retrofitting. Like the Senate Report, the House Report spoke strongly against a retrofitting requirement: ..." AT&T Reply at p. 3.

22. *Discussion.* The report of the Senate Committee on Commerce, Science, and Transportation indicates that the Committee considered application of the new law to refurbished telephones, but concluded it would be too expensive. At pages 4 and 5 of the Senate Report, the Committee stated that it

> believes that an HAC requirement [for new telephones] would impose no additional cost on consumers. On the other hand, retrofitting telephones currently in use to make them HAC *or requiring refurbished telephones to be compatible appears to be too costly at this time.* [Emphasis added.]

After finding it too costly to impose the HAC requirement on refurbished telephones, the Committee's report implies that the issue would disappear as old telephones are replaced by new ones. Senate Report at p. 5. There is other language in this report which explicitly excludes refurbished telephones from the HAC requirement. For example, at pages 8 and 9, it is stated: "The bill does not apply to refurbished, repaired, or resold phones. . . . The bill does not require retrofitting of non-HAC telephones manufactured before the effective date of the legislation." Requiring refurbished telephones to meet the HAC standard would necessitate some retrofitting. Other than coin-operated and emergency telephones, the Commission cannot require telephones to be retrofitted to meet the HAC standard. *See* HAC Act § 710(f).

23. The House Report on which NCLD-OUT relies is inapplicable to this point. As AT&T states, the House adopted the Senate version of the new law and therefore it is the Senate's characterization of the legislative history which is pertinent here because the two houses' views differed. Accordingly, as we noted in the FNPRM, at p. 4, the new law expressly does not apply to refurbished telephones.[19] Nor, as demonstrated above, do we have authority to require application. We therefore reject NCLD-OUT's proposal.

24. *Exemptions.* GTE points out that some telephones may fit more than one category of exemption, entitling such units to be exempt on multiple grounds. For example, GTE states it uses cordless telephones in the provision of its air-to-ground telephone services. It states that under the HAC Act these cordless telephones are exempt because (1) they are cordless telephones (exempt until August 16, 1991), and/or (2) they are used with public mobile service. GTE therefore believes "final rules should recognize that equipment may properly fit more that one category. If the equipment is not categorically excluded by the exemption. . . then the equipment may still be exempt based upon the application for which it is used. . . ." GTE Comments at pp. 4 and 5.

25. For its part, NCLD-OUT states that while the HAC Act exempts some telephones from the HAC requirement, it requires the Commission to periodically review the exemptions to determine whether they still serve the public interest. NCLD-OUT explains that although the HAC Act does not specify the interval in which this review is to occur, it recommends that the Commission do so every two years. It contends that technology changes rapidly. By assessing the exemptions every two years, NCLD maintains that the Commission would be assuring that the exemptions remain temporary.

26. *Discussion.* Some non-HAC telephones, such as cordless telephones, which are exempted presently until 1991, may be directly connected to the telephone network, or may be used indefinitely with an exempted service (such as public mobile services). The provision for telephones used with public mobile services was crafted by Congress because it was demonstrated that there was a potential for interference between hearing aids and the mobile telephone when operated in that environment, making operational compatibility impossible in that case.[20] *See* House Report at pp. 7 and 13. This potential level of interference does not necessarily exist in other environments or with other services. Thus, the exemption provided to all devices for a given service does not automatically apply to those devices for all purposes. The HAC requirement is applicable to all telephones, except when employed in those situations specifically exempted under the rules, *e.g.*, those used with public mobile services. The same telephone used with residential telephone services, for example, would need to be HAC. We find this approach consistent with the intent of the HAC Act.

27. NCLD-OUT's recommendation of biennial exemption review is not suffficiently supported. A more practical approach would entail an appraisal either *sua sponte* or upon submission of information demonstrating that the interference problem has been addressed and the exemption is no longer warranted. Under NCLD-OUT's proposal, if there is no change in technology in two years which eliminates the interference problem on which the exemption is founded, no useful purpose would be served by a proceeding, nor would such a proceeding be a prudent use of Commission resources. Absent any evidence that the noise problem has been eliminated, we will review the exemption every five years to fulfill the requirement of the HAC Act. We will rely on this approach and our observation of marketplace and technological changes to initiate an assessment of the continued utility of the exemptions.

28. *Other Matters.* Finally, NCLD-OUT questions whether the Commission has abandoned consideration of other issues raised in the *Notice* affecting services for the hearing impaired, such as interstate relay service for users of Telecommunications Devices for the Deaf, amplifiers for pay telephones and the establishment of an advisory committee. These and other issues will be addressed in a subsequent phase of this proceeding.

CONCLUSION AND ORDERING CLAUSES

29. The new rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of these new rules will be subject to approval by the Office of Management and Budget as prescribed by the Act.

30. For the purposes of the Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission certifies that this report and order will not have a substantial economic impact on a significant number of entities. Where alternative resolutions were available, we have chosen the least costly alternative and in some instances have eliminated unnecessary requirements. This order fulfills the instructions of Congress described in the HAC Act.

31. Accordingly, IT IS ORDERED, pursuant to Sections 1 and 4(i) of the Communications Act, 47 U.S.C. §§ 151 and 154(i), and the Hearing Aid Compatibility Act of 1988, Public Law 100-394, that Part 68 of the Commission's Rules and Regulations is amended as set forth in the attached appendix.

32. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this order to be printed in the Federal Register and shall send a copy to the Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. § 601 *et. seq.*, 1980).

33. IT IS FURTHER ORDERED, that the rule amendments adopted herein shall become effective August 17, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 68 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 68) is amended as follows:

1. Section 68.3 is amended to add the following definitions:

§ 68.3. Definitions.

Essential Telephones: Means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids.

Public Mobile Services: Means air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, and other common carrier radio communication services covered by Part 22 of Title 47 of the Code of Federal Regulations.

Private Radio Services: Means private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services.

Secure Telephones: Means telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

2. Section 68.4 is revised to read as follows:

§ 68. 4 Hearing aid - compatible telephones.

(a)(1) Except for telephones used with public mobile services, telephones used with private radio services, and cordless and secure telephones, every telephone manufactured in the United States (other than for export) or imported for use in the United States after August 16, 1989, must be hearing aid compatible. Every cordless telephone manufactured in the United States (other than for export) or imported into the United States after August 16, 1991, must be hearing aid compatible.

(2) Except as provided in § 68.112(c)(1) and (4), every telephone listed in § 68.112 shall be hearing aid-compatible.

(3) A telephone is hearing aid-compatible if it provides internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility.

(4) The Commission shall revoke or otherwise limit the exemptions of subsection (a)(1) of this section for telephones used with public mobile services or telephones used with private radio services if it determines that (a) such revocation or limitation is in the public interest; (b) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals; (c) compliance with the requirements of Section 68.4(a)(1) is technologically feasible for the telephones to which the exemption applies; and (d) compliance with the requirements of Section 68.4(a)(1) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

3. Section 68.5 is added to Part 68 to read as follows:

§ 68.5 Waivers.

The Commission may, upon the application of any interested person, initiate a proceeding to waive the requirements of Section 68.4(a)(1) with respect to new telephones, or telephones associated with a new technology or service. The Commission shall not grant such a waiver unless it determines, on the basis of evidence in the record of such proceeding, that such telephones, or such technology or service, are in the public interest, and that (A) compliance with the requirements of Section 68.4(a)(1) is technologically infeasible, or (B) compliance with such requirements would increase the costs of the telephones, or of the technology or service, to such an extent that such telephones, technology, or service could not be successfully marketed. In any proceeding under this section to grant a waiver from the requirements of Section 68.4(a)(1), the Commission shall consider the effect on hearing-impaired individuals of granting the waiver. The Commission shall periodically review and determine the continuing need for any waiver granted pursuant to this section.

4. Section 68.224 is revised to read as follows:

§ 68.224 Notice of Non - hearing aid compatibility.

Every non-hearing aid compatible telephone offered for sale to the public on or after August 17, 1989, whether previously-registered, newly registered or refurbished shall:

(a) Contain in a conspicuous location on the surface of its packaging a statement that the telephone is not hearing aid-compatible, as is defined in § 68.4(a)(3) of these rules, or if offered for sale without a surrounding package, shall be affixed with a written statement that the telephone is not hearing aid-compatible, as defined in § 68.4(a)(3) of these rules; and

(b) Be accompanied by instructions in accordance with § 68.218(b)(5) of the rules.

FOOTNOTES

[1] "Essential Telephones" include only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using hearing aids specially designed for telephone use. 47 U.S.C. § 710(b).

[2] Access to Telecommunications Equipment by the Hearing Impaired and Other Disabled Persons, Order, CC Docket No. 83-427, 49 Fed. Reg. 1352 (January 11, 1984), *modified*, 49 Fed. Reg. 19666 (May 9, 1984), *further modified*, FCC 84-382 (released August 13, 1984) (Hearing Impaired proceeding); 47 C.F.R. Part 64, subpart F, Sections 68.4, 68.112, 68.218, 68.224 and 68.316.

[3] Most external hearing aids have a built-in telephone pick-up, or "telecoil," which is activated by a switch on the hearing aid. When this switch is placed in the "telephone" position, the microphone is turned off and the hearing aid can be used at full volume without feedback and with minimal background noise. These hearing aids are activated by the magnetic field generated by telephone handsets. In-the-ear hearing aids generally rely on audio amplification rather than electromagnetic coupling (and a telecoil) to provide the wearer with telephone access. Unless otherwise indicated, references to hearing aid compatible telephones refer to equipment which is compatible with a telecoil type hearing aid. *See* House Report No. 97-888, 97th Cong., 2d Sess., at 8.

[4] *See* Telecommunications Services for the Deaf and Hearing Impaired, Notice of Inquiry, CC Docket No. 78-50, 667 FCC 2d 1602 (1978), *terminated*, FCC 83-177 (released May 3, 1983).

[5] *See* note 2 *supra*.

[6] The House Report accompanying the Disabled Act states:

> The reported bill does not require all telephones to be compatible with hearing aids. Rather, the bill preserves consumer choice while ensuring that the needs of the hearing impaired are fully served. The legislation focuses on those "essential telephones" to which the hearing impaired must have access if they are to function effectively in modern society. Companies are free to manufacture and to market non-compatible telephones, and businesses and consumers may purchase these instruments for use by persons who do not have hearing impairments.

House Report No. 97-888, 97th Cong., 2d Sess., at 9.

[7] 4 FCC Rcd 2250 (1989).

[8] Comments were filed by the American Telephone and Telegraph Company (AT&T); BellSouth Corporation; GTE Service Corporation (GTE); the National Center for Law and the Deaf, the Organization for Use of the Telephone, Inc., the Maryland Office of People's Counsel, the New York League for the Hard of Hearing, the Hearing and Speech Agency of Metropolitan Baltimore, Inc., the Maryland Governor's Commission on Hearing Impairments, the Maryland Governor's Office for Handicapped Individuals, Telecommunications Exchange for the Deaf, Inc., Telecommunications for the Deaf, Inc., and Minnesota Telecommunications Access for Communicatively Impaired Persons (collectively NCLD-OUT); and the United States Telephone Association (USTA). Reply comments were filed by AT&T; GTE; NCLD-OUT and the North American Telecommunications Association (NATA).

[9] GTE offers similar comments. GTE Comments at pp. 2 and 3. *See* Appendix for entire rule language as adopted in this proceeding.

[10] *See* Access to Telecommunications Equipment and services by the Hearing Impaired and Other Disabled Persons, 3 FCC Rcd 1982 (1988).

[11] NCLD-OUT favors expansion of the definition of "essential" telephones and requests that the definition include telephones in hospitals, hotels and motels. NCLD-OUT Comments at p. 3.

[12] The Senate Report at p. 11 states that "'[e]ssential" telephones are defined in this new section exactly as they are defined in the 1982 Act" (Disabled Act).

[13] Our current definition of coin-operated telephones reflects the language contained in the Disabled Act. *See* 47 C.F.R. § 68.112(c)(1).

[14] *See* para. 23, *infra*.

[15] We note too that Congress concluded that retrofitting existing non-compatible telephones to be HAC is too costly. It specifically stated that the HAC Act is inapplicable to these telephones at this time: "The Committee believes that the benefits of requiring all telephones to be HAC at this time are outweighed by [retrofitting] costs." Senate Report at p. 5.

[16] Generally, these telephones are not available for public use. The Government normally contracts with a manufacturer for a specifically designed telephone for a governmental application. Such telephones are normally limited to use by the Government and its outside private contractors for discussion of sensitive matters. Therefore, we anticipate that only a small quantity of these telephones will enter the public market.

[17] Comments of NCLD-OUT filed July 26, 1988.

[18] AT&T Reply at p. 2, citing [1988] U.S. Code Cong. and Adm. News 1345.

[19] Senate Report at pp. 7-8.

[20] *See* Appendix, amended Section 68.4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-353

In re Applications

PERRY TELEVISION, INC. File No. BPCT-870317KH

RADIO PERRY, INC. File No. BPCT-870317KI

For Construction Permit
for a New Television Station
Perry, Georgia

Appearances

Seymour M. Chase on behalf of Perry Television, Inc.; *Eric S. Kravetz* on behalf of Radio Perry, Inc.; *Charles E. Dziedzic* and *Y. Paulette Laden* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: May 23, 1989; Released: June 2, 1989

PRELIMINARY STATEMENT

1. There are two mutually exclusive applications for a construction permit for a new commercial television station on Channel 58 at Perry, Georgia. The applicant parties are: Perry Television, Inc. ("Perry TV") and Radio Perry, Inc. ("Radio Perry"). These two applications, and one other that was dismissed,[1] were designated for hearing by *Hearing Designation Order* DA 87-1215 (released September 8, 1987), 2 F.C.C. Rcd 5475 (1987), and published at 52 Fed. Reg. 35,140 (September 17, 1987).

2. The following issues set under the *Hearing Designation Order, supra* remain to be decided:

> 1. To determine, with respect to Radio Perry, Inc., whether its ownership of Stations WPGA(AM) and WPGA(FM), Perry, Georgia, and the proposed television station would be consistent with Section 73.3555(b) (1 and 2) of the Commission's Rules, and if not whether common ownership, operation, or control of the stations in question would be in the public interest.
>
> 2. To determine, with respect to Radio Perry, Inc. and Perry Television, Inc., whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

See Hearing Designation Order, supra at Para. 7. By *Order*, FCC 88M-1146, released April 19, 1988, the Presiding Judge authorized the presentment of comparative coverage evidence.

3. By *Memorandum Opinion and Order*, FCC 88M-1709, released June 2, 1988, the Presiding Judge added the following issues against Perry TV:

> A. To determine whether David Pierce and or James Geiger is a real party-in-interest in Perry Television, Inc. and, if so, whether Perry Television, Inc. is qualified to become a Commission licensee.
>
> B. To determine whether Perry Television, Inc. misrepresented or was lacking in candor in its proposal to the Commission in its application Form 301 which failed to disclose that David Pierce and/or James Geiger was a real party-in-interest and, if so, whether Perry Television, Inc. is qualified to become a Commission licensee.

4. Prehearing conferences were held on November 10, 1987, and on June 10, 1988. The Presiding Judge required that Integration and Diversification Statements be filed and exchanged by September 30, 1987. *See Order Prior To Prehearing*, FCC 87M-2188, released September 15, 1987. Direct case hearing exhibits were filed on April 18, 1988 and trial briefs were filed and served on the added issues. *See Order*, FCC 88M-1825, released June 14, 1988. Hearing sessions were held on June 6 and 7, 1988, and on October 11, 12, 13, 14, 18, 20, 25, 26 and 27, 1988. The Presiding Judge established January 23, 1989 and February 27, 1989, as the deadlines for filing Proposed Findings and Fact and Conclusions of Law and Reply Findings of Fact and Conclusions of Law, respectively. *See Order*, FCC 88M-3897, released November 16, 1988. The record was closed on December 20, 1988, and was later reopened and reclosed on February 1, 1989 to receive into evidence certain documents that were not available at trial. *See Order*, FCC 89M-360, released February 3, 1989. The parties filed their briefs in accordance with the above schedule and the case is now ready for an initial decision.

5. This decision addresses first those issues which are qualifying and secondly the comparative issues. It is issued in accordance with the Commission's standards at 47 C.F.R. §1.267(b) (initial decision to include findings of fact and conclusions of law as well as reasons or basis therefore). The burden of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C.A §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *S. E. C.*, 450 U.S. 91, 101 S.Ct. 999, 1007 (1981). References to exhibits shall be "Perry TV Exh. _____ for Perry TV and "RP Exh._____ " for Radio Perry. Testimony is cited where practicable by the name of the witness followed by the transcript page number, *e.g.*, "Smith, Tr. 0001." References to Proposed Findings of Fact and Conclusions of Law are designated "PFC" and references to Reply Findings and Conclusions are designated "RPFC."

FINDINGS OF FACT

6. Since the two applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945).

QUALIFYING ISSUES

Air Hazard

7. The air hazard issues designated against both applicants have been resolved. On February 16, 1988, Radio Perry filed a motion for summary decision in its favor based on a determination from the Federal Aviation Authority ("FAA") that no hazard to air navigation is created by its proposal. Summary relief was granted in favor of Radio Perry. *See Order* FCC 88M-617, released March 4, 1988. Perry TV offered equally substantial evidence at trial. (Perry TV Exh. 14; Chase, Tr. 597-99.) Based on that evidence the air hazard issue in now resolved in favor of Perry TV as there remains no genuine issue of material fact.

Party - In - Interest

8. The special issues added against Perry TV relate to allegations that two non-voting shareholders, Susan D. Pierce and Paula H. Geiger, who own 50% of the equity, were under the control of their husbands, David M. Pierce and James H. Geiger, who in turn controlled or influenced the application. In other words, an issue to be determined here is whether Mr. Pierce and Mr. Geiger are real parties-in-interest who controlled or influenced the application and whether their respective wives served as conduits for their own investment interests. The Presiding Judge had determined based on the allegations of Radio Perry, and the response to such allegations by Perry TV, that there had been a *prima facie* case made for adding the issues and that if the issues were not added and litigated here there was a likelihood that the issues would be remanded. *See Armando Garcia*, 3 F.C.C. Rcd 1065, 1067 (Review Bd 1988). *See also Religious Broadcasting Network, et al.*, 3 F.C.C. Rcd 6216 (Review Bd 1988) (remand ordered to determine extent of lawyers' involvements). Thus, the ruling adding the issues was not a determination on the merits against Perry TV's integration proposal or its basic character qualifications. But if that issue is resolved against Perry TV, it would be disqualified from comparative consideration. *Louis Adelman*, 28 F.C.C. 432, 434 (Comm'n 1960), *aff'd sub nom Guinan* v. *F. C. C.*, 297 F.2d 782 (D.C. Cir. 1961) (basic qualifications of an applicant should be assessed before comparative analysis).

Perry Television, Inc.

9. Perry Television is a corporation organized under the laws of the State of Georgia. It is authorized to issue both common voting stock and preferred non-voting stock. Its officers, directors, and stockholders as of the "B" cut-off date herein (April 16, 1987) were as follows:

Name	Office	Director	Stock %	Equity %
Quentin C. Harvey	President	Yes	31 VS */	15.5
Veronica Denise Ingram	Secretary/ Treasurer	Yes	31 VS	15.5
Hervia M. Ingram	Vice Pres.	Yes	9 VS	4.5
Catherine H. Ingram	None	Yes	9 VS	4.5
Lorna Cabasares	None	No	10 VS	5.0
Alexander Dy	None	No	10 VS	5.0
Susan D. Geiger	None	No	50 NVS */	25.0
Paula H. Geiger	None	No	50 NVS	25.0

*/ VS = Common voting stock.
NVS = Non voting Stock.

10. Its current officers, directors and stockholders are as follows:

Name	Office	Director	Stock %	Equity %
Hervia M. Ingram	President	Yes	14 VS	7.0
Lorna Cabasares	Vice President & Ass't Secretary	Yes	31 VS	15.5
Veronica Denise Ingram	Secretary/ Treasurer	Yes	31 VS	15.5
Alexander Dy	None	No	10 VS	5.0
Catherine H. Ingram	None	Yes	14 VS	7.0
Susan D. Geiger	None	No	50 NVS	25.0
Paula H. Geiger	None	No	50 NVS	25.0

(PTI Exh. 2.)

The Promoters

11. Messrs. Pierce and Geiger are equal partners in their law firm, Geiger & Pierce, P.C., through which they practice general law on a full-time basis in an around Perry, Georgia, the community of license. The partners have from time to time invested in local real estate opportunities in addition to practicing law. (Pierce, Tr. 835, 838-39; Geiger, Tr. 1386.) Mr. Geiger is also an investor in real estate on his own behalf and in 1987 he earned more money from real estate than from his law practice. (Geiger, Tr. 1142-44.)

12. The Perry TV proposal was initiated by a telephone call made by Perry TV's communications counsel, Mr. Chase, to Mr. Geiger. (Chase, Tr. 647-48.)[2] Mr. Chase was obviously feeling out Mr. Geiger to see if there was any interest in forming a local group to file a competing application. Radio Perry's principal, Lowell L. Register, had petitioned the Commission to allocate Channel 58 to Perry and Mr. Chase must have realized that Mr. Register would apply on Form 301 for the construction permit

when the filing deadline had been triggered by the filing of the dismissed Ohendolski application on December 16, 1986. (Chase, Tr. 646, 658.)

13. Mr. Chase presented Mr. Geiger with a thorough overview of the comparative process, including the credits allowed for diversification and local principals, the enhancements for women and minorities, and the need for an antenna site. (Chase, Tr. 645 et seq.) Mr. Chase also presented Mr. Geiger with a cost estimate of $3 million to $3.5 million. Mr. Geiger discussed the project with Mr. Pierce and from that point on Mr. Pierce "attended to what was called for." (Perry TV PFC at 31; Chase, Tr. 665.) But Pierce did report on progress to Geiger periodically. (Geiger, Tr. 1219.) And Chase's retainer was paid by Pierce on a check drawn on the law firm's "investment account." (RP Exh. 21; Pierce, Tr. 674.) Thus, Mr. Geiger is bound by the acts of Mr. Pierce on behalf of the firm's client, Perry TV.

The Promotion Process

14. Mr. Pierce promoted the venture to friends and acquaintances in Perry who became principals. Mr. Perry is an established citizen in the Perry community and he would be received as such by those he solicited. He first called Dr. Horatio Cabasares, a client and a personal friend, who along with his wife was Filipino, i.e., a minority. At that time Pierce was particularly interested in enrolling Dr. Cabasares' wife, Lorna. (Pierce, Tr. 846-47; L. Cabasares, 2154-55.) He also told Dr. Cabasares that he was interested in learning about other "orientals" who might be interested. (PTI Exh. 15, p. 1; Pierce, Tr. 846-47.) After that, Lorna Cabasares joined the venture. In the meantime, the Cabasares had contacted their friend, Mr. Alexander Dy, also a Filipino. (PTI Exh. 7; L. Cabasares, Tr. 2166; Dy, Tr. 2280.) Mr. Dy, a car join the venture was reported back to Pierce by Dr. Cabasares. (Pierce, Tr. 853.) Neither the Cabasares nor Mr. Dy were informed of the $3 million cost estimate. Next Mr. Pierce contacted Mr. Quentin Harvey, a former high school athlete whom Susan Pierce had taught in high school. (Pierce, Tr. 849.) Harvey was an automobile salesman. There was no disclosure of costs for construction and operation. Harvey was Black and therefore he qualified for a minority preference. These were the first three voting shareholders. Each was solicited and brought in by Pierce and each qualified for a minority preference. But the Cabasares and Mr. Dy were not U.S. citizens and therefore were limited to holding 20% of the voting power. Quentin Harvey was assigned the remaining 80% of the voting stock. But Quentin Harvey was unable to be reached the day prior to the filing deadline and so Ms. Veronica Denise Ingram (hereinafter "Denise Ingram") was substituted as the principal to review and sign the Form 301 on the last day. Ms. Ingram worked in the Washington, D.C. office of Perry's Congressman and therefore she was readily available to sign the application in Mr. Chase's officer. Ms. Ingram qualifies for gender and minority preferences and Ms. Ingram was also located through the efforts and contacts of Mr. Pierce. On March 17, 1987, Ms. Ingram agreed to sign on and receive 40% of the voting shares, leaving Harvey with the remaining 40%.

15. While Mr. Pierce was assembling the group, Mr. Chase was preparing the Form 301 application. (Chase, Tr. 696, 689.) Mr. Chase contacted an equipment manufacturer for a list of equipment needed and arranged for a credit letter. (RP Exhs. 11, 12.) Mr. Chase also retained an engineer to prepare the technical portion of the application. The site selected was property owned by Messrs. Pierce and Geiger. (RP Exh. 4; Chase, Tr. 673.) Chase sent Pierce a form bank letter which Pierce used in obtaining a bank loan commitment through a friend and client. (RP Exh. 13; Pierce, Tr. 863-67.) Radio Perry suggests that the record supports an inference that Chase did not have solid estimates when the bank commitment was obtained. (*See* Radio Perry's PFC at 15-16.) But the record is clear that from the beginning Chase, Pierce and Geiger were using the $3 million to $3.5 million estimate and Radio Perry has not attacked that amount as unreasonably low. In any event, since there is no financial issue set in this case the narrow evidence and inference raised by Radio Perry are irrelevant and will not be addressed further. The significant facts are those surrounding the manner in which decisions were made at the filing stage. On March 17, 1987, Ms. Ingram came to Mr. Chase's office at 12 noon to review documents and assess whether or not she wanted to participate. (D. Ingram, Tr. 1704.) She was first contacted the previous day through Mr. Pierce's efforts. (Chase, Tr. 691; D. Ingram, Tr. 1698-1700.) At her meeting with Chase, Ms. Ingram agreed to join the venture. She signed the application Form 301 and various corporate documents that had been prepared reflecting her as Perry TV's secretary/ treasurer, a director and a voting shareholder. (D. Ingram, Tr. 1705-06, 1713, 1722, 1725.) She signed the site certification in the application on the basis of Chase's verbal assurance that the owners had agreed to make the land available. She was shown the bank commitment letter and the equipment price list. But there was no discussion about the amount of funds needed to pay for the proposed tower or how construction funds would be raised or what collateral (if any) that Ms. Ingram would be required to provide. (D. Ingram, Tr. 1708-10, 1713, 1716-19, 1722.) At trial, Chase examined Ms. Ingram specifically on what she knew about costs when she signed. She testified in response to leading questions that she had seen the equipment list and that she had been told by Chase the amount of the legal and engineering fees for the application and an estimate of fees and costs for the prosecution to follow. (D. Ingram, Tr. 1760-62.) She was also shown the bank commitment and she was able to square the commitment with the overall estimates. But in view of the time-frame involved, it is unreasonable to accept that Ms. Ingram participated in formulating any of the data. For example, Radio Perry notes that the cost of a 1,525 foot tower had not been included with the costs. (RP Exh. 4 at pp. 5, 12, 19.) She merely accepted what Mr. Chase disclosed. Mr. Chase filed Perry TV's application on the same day that Ms. Ingram signed it. It is found based on her testimony that Ms. Ingram did not participate in a meaningful way in the structuring or finalization of Perry TV's proposal. For example, the following colloquy reflects the passive role that Ms. Ingram took on the day she signed the application, a role necessitated by the inadequate time period allowed for an active role.

> Mr. Chase: When you were in my office on March 17th, 1987, did you make an inquiry of me about projected costs for this project, or estimated costs for this project?

> Ms. Ingram: [No answer recorded]
>
> Mr. Chase: That's not very well stated. When you were in my office on March 17th, did you ask any questions about - - of me as to what this project might cost?
>
> Ms. Ingram: I don't recall asking you specifically.

(D. Ingram, Tr. 1760.) Mr. Chase then was permitted to lead her in the areas that she testified to with specifics. It is accepted that on March 17, Chase reviewed the specific costs (except for the tower) with her. But that was all done in a compressed time period just prior to obtaining her signature with filing being a prime concern since it was the last day.

16. The imparting of complex and incomplete cost estimates on the last day does not support a finding that Ms. Ingram was participating as a principal on that day rather than as an accommodation to fill the void created by the unavailability of Quentin Harvey. Moreover, the fact that Ms. Ingram was unable to testify to relevant facts without her counsel asking leading questions diminishes the weight of her testimony and supports a conclusion that Ms. Ingram was not in control of the application, site selection or financing when the application was filed. Chase and Pierce were in control.

17. Nor did Ms. Ingram acquire control over formulating the corporate structure which was left to Chase and Pierce. Mr. Chase provided language which described the corporate purpose (business of television broadcasting) and Chase set the capital structure: 10,000 shares common voting stock (@ $10 par) and 10,000 shares preferred non-voting stock (@ $10 par). (RP Exh. 6, p.2.) Mr. Pierce drafted the provisions of the articles of incorporation with respect to preferred shareholder rights. (Pierce, Tr. 1022-31.)[3] According to Geiger, Susan Pierce and Mrs. Geiger were not contemplated to become preferred shareholders until sometime in April 1987. (Geiger, Tr. 1225.) The Pierce provisions of the articles of incorporation state that:

> (a) the preferred shareholders are entitled to receive semi-annual dividends at a rate of 7% per share out of the net profits of the company, with unpaid dividends earning interest at 7% per year;
>
> (b) the stock of preferred shareholders may be purchased by the corporation for $150 per share after January 1, 1992;
>
> (c) the preferred shareholders will be paid $150 per share (plus dividends) upon the liquidation or dissolution of the corporation before any payment is made to the other shareholders;
>
> (d) the preferred shareholders will be given one vote per share in the event that two consecutive semiannual dividends are in default; and
>
> (e) the corporation will establish a "sinking fund" into which it will semi-annually deposit 10% of the net profits remaining after the semi-annual dividends are paid to the preferred shareholders, which sums will be used to pay $150 per share for the preferred stock as provided in the preceding sections of the Article.

(RP Exh. 6.) Although he consulted a form book for the provisions, Mr. Pierce selected those he wanted to use and he selected the date in 1992 which he calculated as the date that the station would be on-the-air. (Pierce, Tr. 1032-34.) Pierce would have been an investor himself except for ethical considerations resulting from the firm acting as local counsel for a corporate client that would be in litigation. (Pierce, Tr. 1036-37.) Pierce and Geiger's testimony and the circumstances establish as a matter of fact that since Messrs. Pierce and Geiger felt themselves precluded from investing, the investment opportunities that the articles of incorporation contemplated for preferred shareholders were offered to their wives. The rational of spousal attribution necessarily attaches here since the legal advice from husband to wife when the wife is not an attorney, subsumes influence by the attorney spouse over the legal decision.

18. The facts establish that Mr. Pierce played a key role in structuring the corporation and in doing that he insured that his wife and Mrs. Geiger would have the protections that general corporate law provides for preferred shareholders (dividends from net profits). At that point in time Mr. Pierce, along with Mr. Chase, was acting as a promoter who was involved in structuring the corporation. *See Carey, Corporations Cases and Materials*, 4th Ed (unabridged) at 87-88. But the provision for a set amount ($150 per share) on liquidation or dissolution, the automatic provision for preferred shareholders' voting rights accruing if the corporation missed two dividend payments, and the establishment of a "sinking fund" that guarantees money in-the-bank to redeem their shares are terms that are so favorable to Mrs. Pierce and Mrs. Geiger that they constitute substantial proof that Mr. Pierce and Mr. Geiger would insulate investments through their spouses and that Mr. Pierce was exercising control over the application and the voting shareholders at the time that he drafted the articles of incorporation. In fact, the benefits provided for preferred shareholders were locked in by a provision of the bylaws that was suggested by Chase. (Chase, Tr. 746.) Neither the directors nor the voting shareholders may, without the consent of 2/3 of the owners of 2/3 of the preferred stock, amend the articles of incorporation so as to effect any change to the detriment of preferred stockholders. (RP Exh. 7, Para. 7.4(a).) The bylaws also assure that loans made by preferred shareholders are repaid before dividends are paid and preclude any changes to the articles of incorporation that would effect any detrimental change to the preferred shareholders. *Id.* Thus, Pierce, with the assistance of Chase, had assured the optimal protection for preferred shareholder investors who were the spouses of the promoters. Pierce continued to be in a control position sufficient to influence the proposed voting shareholders to join the venture under terms and conditions which were so favorable to the preferred shareholders, Mrs. Pierce and Mrs. Geiger.

19. The following ultimate facts are found based on the foregoing evidence. The literature establishes that corporate promotion has three stages: "discovery, investigation and assembly." *Id.* Mr. Chase did the "discovery," the "investigation" and the FCC "assembly," except insofar as the preferred shareholders were concerned. Mr. Pierce undertook local corporate "assembly" by obtaining local principals who were minorities. He also was serving in the capacity of local counsel for Perry TV. (Pierce, Tr. 852.) From these positions of promoter and corporate counsel, Pierce was able to and did in fact control the

incorporation, the obtaining of voting shareholders, the obtaining of a tower site, the obtaining of a bank letter and the protection for investing preferred shareholders. Since Pierce was acting on behalf of Geiger & Pierce, P.C., Mr. Geiger was bound by the actions of his partner, Mr. Pierce. Geiger also was kept personally informed of developments. (Chase, Tr. 665; Pierce, Tr. 888; Geiger, Tr. 1219.) It is found as a fact that Geiger and Pierce contemplated that Mrs. Pierce and Mrs. Geiger would be the beneficiaries of those beneficial provisions because of the proximity of time between incorporation (March 17, 1987) and their stock purchases and loan commitments (April 16, 1987). The testimony negating that the spouses were contemplated as investors is rejected because of the attendant circumstances. Mr. Chase suggested that such provisions be included just in case Geiger & Pierce "happened to come upon" someone who was attracted to the project but who would not qualify for a minority preference. (Chase, Tr. 697.) The relevant testimony concerning the drafting is as follows:

> Q. - - - Articles of Incorporation, do you know who drafted that?
>
> A. The drafting was done in the offices of Geiger and Pierce, and I think by or under the direction of Mr. Pierce, but on the bases of numerous recommendations made by me.
>
> Q. - - - was any recommendation [made] that the Articles of Incorporation provide for two classes of stock?
>
> A. I recommended that.
>
> Q. Even though at the time this was drafted there were no preferred shareholders to your knowledge.
>
> A. That's correct.
>
> Q. Were there any preferred shareholders to your knowledge?
>
> A. There were not.

(Chase, Tr. 696-97.) This testimony establishes that there were no preferred shareholders when the provisions were drafted but it does not negate that they were then contemplated. Mr. Pierce testified that investor shareholders were not contemplated at the time the application was filed but it was felt that at "some point in the future you certainly want to have investors in it for funding purposes." (Pierce, Tr. 873-74.) This testimony taken in context does establish that investors were contemplated for the future. Mr. Pierce and Mr. Geiger felt constrained to not themselves invest because of ethical considerations against investing in clients who were involved in litigation. But they wanted to invest and they could do so through their wives. Although legal title would be in names of the spouses, the beneficial interests would accrue mutually through the spousal relationships.

Spouses Contemplated As Investors

20. Mrs. Pierce first learned of Perry TV sometime in the end of March. (S. Pierce, Tr. 1379.) Mrs. Pierce was told by Mr. Pierce that there was an opportunity to invest in a local TV station that was coming to Perry and he said it was a good investment. On his recommendation she said she wanted to invest. (S. Pierce, Tr. 1386-87.) She relied on her trust in his judgment. He had never given bad advice and they have been married for 20 years. (S. Pierce, Tr. 1386-88.) Mrs. Geiger also testified that she first heard of Perry TV from her husband in late March. (P. Geiger, Tr. 1480.) It was in April that her husband suggested that she might invest. (P. Geiger, Tr. 1482-83.) In that same conversation with her husband, Mrs. Geiger learned from him that Susan Pierce would also be interested in making an investment. (P. Geiger, Tr. 1484-85.) The parallelisms between the testimony of the wives also support the inference drawn from substantial evidence that an investment by Geiger & Pierce or their wives was contemplated when the favorable provisions for preferred shareholders were drafted by Pierce in mid-March.

21. The evidence establishes that Mrs. Pierce and Mrs. Geiger were relying on their husbands for their investment decisions on April 16, 1987. Neither Mrs. Pierce nor Mrs. Geiger read the articles of incorporation, which described their rights as preferred shareholders, until after they subscribed for shares. (S. Pierce, Tr. 1375-77, P. Geiger, 1511.) Mrs. Pierce and Mrs. Geiger had never been in business together before. (S. Pierce, Tr. 1385.) Their husbands, on the other hand, had previously purchased and sold an office building in downtown Perry and they had invested together in other land ventures. (S. Pierce, Tr. 1385-86.)

22. This was the first stock investment for Mrs. Pierce, a full-time school teacher who relied on her husband to prepare their joint tax returns. (S. Pierce, Tr. 1389.) Mrs. Geiger had been a partner with her husband in a local radio show business which they sold after operating it through a manager for about 3 months. (P. Geiger, Tr. 1487.) Mrs. Geiger is not employed now and she left her profession as school teacher about 10 years ago. (P. Geiger, Tr. 1476-77.) Mrs. Geiger did not read documents before she signed as a subscriber because it was a "matter of trust" and she trusted her husband and Mr. Pierce. (P. Geiger, Tr. 1493-94.) Similarly, Mrs. Pierce did not read related documents until about two weeks before her testimony because: "I trust my husband's judgment." (S. Pierce, Tr. 1387.)

23. Pierce and Geiger told their respective wives about the investment opportunity around the same time. When Mr. Geiger told Mrs. Geiger about the opportunity, Mrs. Pierce's interest in the investment was mentioned in the same conversation. (P. Geiger, Tr. 1484-85.) Mrs. Pierce first learned of the opportunity in April 1987 when her husband told her about a new TV opportunity which needed investors. (S. Pierce, Tr. 1480-82.) Nothing was said to her about the costs of construction or the costs of the prosecution of the application. (S. Pierce, Tr. 1387.) Mrs. Geiger asserted that she was not concerned about construction and prosecution costs because her exposure to a loan default was limited to $50,000. (P. Geiger, Tr. 1484.) Mrs. Pierce had no knowledge of Mr. Dy when she signed in April. (S. Pierce, Tr. 1385.) Mrs. Geiger knew personally only Lorna Cabasares. She only knew of the Ingrams. Mrs. Geiger only knew that there was a group of voting shareholders that had been assembled when she

signed in April. (P. Geiger, Tr. 1495.) The stock purchased by Mrs. Pierce was paid out of a joint checking account in the name of "Mr. or Mrs. David M. Pierce." (RP Exh. 23.) Mrs. Geiger paid for her stock from a checking account that was in her name alone. (RP Exh. 24.) But she testified that the money in that account were proceeds from joint investments with her husband. (P. Geiger, Tr. 1500.)

The Incorporation

24. The sequence of events leading up to incorporation also need to be considered in date sequence. Mr. Pierce finalized the articles of incorporation about March 12, 1987. (Pierce, Tr. 1057.) It was established that Perry TV was incorporated on March 17, 1987, the same date that the application was filed. (Pierce, Tr. 1059-60.) The initial registered agent was Mr. Pierce; the incorporator/initial sole director was Quentin C. Harvey; the attorney for the corporation was Geiger & Pierce, P.C. (RP Exh. 6.) The by-laws were prepared by Pierce with input from Chase about the same time as the articles of incorporation, March 12, 1987. (Chase, Tr. 702; RP Exh. 7.) A Consent of Directors in Lieu of Organizational Meeting was signed by Harvey on March 17, 1987, a date when Harvey was the sole director. (RP Exh. 8.) That document was prepared by Chase and specified that the Law Offices of Seymour M. Chase, P.C. was Washington communications counsel. (Chase, Tr. 702.) The following persons were elected to the following positions by that Consent:

President -	Quentin C. Harvey
Secretary/Treasurer -	Veronica Denise Ingram

(RP Exh. 8.) Harvey and Denise Ingram were designated the authorized signatories of an account to be opened at the Bank of Perry. (RP Exh. 8.) That document also prescribed as the first corporate business act:

> the preparation, filing and prosecution of an application to the Federal Communications Commission for a construction permit for a new commercial television station to serve Perry, Georgia, and its environs.

(RP Exh. 8.) Consents in Lieu of First Meeting of Shareholders also were drafted by Chase. (Chase, Tr. 702, 704, 881-82.) This document was executed on March 17, 1987. (*Id.*) The initial subscribers were:

Name	No. Shares	Percent	Consideration
Quentin C. Harvey	100	40%	$1,000
Veronica Denise Ingram	100	40%	1,000
Lorna Cabasares	25	10%	250
Alexander Dy	25	10%	250

(RP Exhs. 9, 10.) Mr. Pierce prepared these documents at his office but Mr. Chase had substantial input concerning the percentage of the shares that the non-citizens were authorized to receive (20% or less for Cabasares and Dy). (Chase, Tr. 702-703.) The Harris equipment letter dated March 16, 1987, was addressed to "Perry Investors, Inc.," a shell corporation which Geiger & Pierce had set up independently of the business venture for Channel 58. (*See* Geiger, Tr. 1160). The bank letter from State Bank and Trust Co. dated March 16, 1987, was addressed to Quentin Harvey. But the form was provided to Pierce by Chase and Pierce was responsible for obtaining the letter from the bank. (Pierce, Tr. 863-67.). All of these documents were prepared prior to March 17. But they were presented to Ms. Ingram on March 17 for the first time for her execution, along with her certification to the application Form 301. Lorna Cabasares and Alexander Dy signed a similar agreement on April 16, 1987, for 90 additional shares and loan commitments up to $10,000. (RP Exh. 15.) Finally, on April 16, 1987, almost one month after Perry TV was incorporated by Pierce, Susan D. Pierce and Paula H. Geiger executed together a Share Subscription Agreement whereby each subscribed for 125 shares of preferred (non-voting) stock at a cost of $10 per share. (RP Exh. 16.) Also on April 16, 1987, Mrs. Pierce and Mrs. Geiger signed separate Stock and Loan Subscription Agreements whereby each agreed to purchase 500 additional shares of preferred stock and committed to make loans of up to $50,000 each. (RP Exh. 17.) On April 20, 1987, by Unanimous Consent in Lieu of Special Meeting of Stockholders, a resolution passed assigning management positions as follows:

Hervia M. Ingram -	General Manager
Alexander Dy -	General Sales Manager
Veronica Denise Ingram -	Program Director
Quentin C. Harvey -	Business Manager
Lorna Cabasares	News Director
Catherine H. Ingram -	Director of Public Affairs and Community Relations

(RP Exh. 18.)

25. On April 16, 1987, the shareholder interests had changed substantially under Unanimous Consents in Lieu of Special Meeting of Stockholders and Directors executed on April 16, 1987. (RP Exh. 14.) Harvey, who had subscribed for 100 shares of voting stock, sold 22.5 shares (9%) to Hervia M. Ingram, Denise Ingram's father. Similarly, Denise Ingram who had subscribed for 100 shares of voting stock, sold 22.5 shares (9%) to her mother, Catherine H. Ingram. The purchase price was $10 per share. It was also recited by shareholders' consents that the spouses of Messrs. Pierce and Geiger would receive their preferred shareholder interests: 125 shares each at $10 per share. (*Id.*) Also, Hervia and Denise Ingram were elected as directors. (*Id.*) Mr. Harvey executed a Stock and Loan and Subscription Agreement on April 16, 1987, wherein he subscribed to an additional 90 shares of voting stock and agreed to make loans to Perry TV up to $31,000. On April 20, 1987, Denise Ingram signed a document reflecting the same terms. (RP Exh. 15.) On April 16, 1987, Hervia and Catherine Ingram signed similar agreements for an additional 90 shares and loan commitments of up to $9,000. (RP Exh. 15.)

Selection of Voting Stockholders

26. As indicated above, the Perry TV venture started with a telephone call from Chase to Geiger who Chase had selected about six weeks before the "A" cutoff from Martindale-Hubbell. (Chase, Tr. 647-48.) Chase has summarized the core of his plan, which is head-noted for reference:

Voting Group Qualifying For Preference

Chase suggested that Geiger consider assembling a group of local persons who fit the Commission's comparative criteria, then spoke of these criteria, including the absence of other communications interests, minority status and the recognized minority groups, female status, and integration into the management of the station. Chase recommended three to five people for this group. He recommended the formation of a corporation.

Investor Group

He then added that a second group could be formed, consisting of non-voting principals, but this was not necessary. He mentioned that the non-voting principals did not need to have the criteria of the voting principals. Then he said that if someone expresses an interest in investing but does not have these characteristics, he need not be turned away but may be invited to invest as a non-voting principal.

Incorporate With Two Tiers

He [Chase] recommended that articles of incorporation be drafted, for approval by the voting principals, and he suggested that the articles provide for two classes of stock, voting and non-voting, so that the articles would not need to be amended later if non-voting principals were added, then he recommended authorization for 10,000 shares of stock of each class.

(Perry TV PFC at 30.) Here the evidence shows that Chase offered Geiger a structure that would give Geiger and his law firm rational economic incentives to follow Chase's suggestions. Geiger & Pierce could act as local counsel in return for legal fees with an added incentive to invest. Since Geiger and Pierce were corporate counsel they would control the terms for investors which were discussed above, permitting them to even include a provision for voting stock [RP Exh. 6] if the expected investment income in the form of dividends did not materialize under the initial management team. Geiger and Pierce would be able to overcome their ethical concerns about attorneys investing in clients that were headed for litigation by offering the investment to their wives. (*See* Perry TV PFC at 53-54.) In view of the trust among the spouses and the logical reliance on the legal and business acumen of the Geiger & Pierce law firm it was reasonable to expect from the time of the Chase telephone call that the investment incentive could be realized through the spouses.[4] It is found as a matter of fact that the testimony of the Pierces and the Geigers did establish that the husbands influenced and controlled the wives in their mutual investments. Mrs. Pierce and Mrs. Geiger are established in their own individual lines of work and the teaching profession and that was demonstrated by the manner in which they answered questions and their demeanor observed by the Presiding Judge on October 14, 1988. But because of the rational reliance on the law firm (e.g., Mrs. Pierce relied totally on her husband to prepare a joint income tax return for her signature (S. Pierce, Tr. 1389)), the fact that Mrs. Geiger relied on her husband in a real estate venture (P. Geiger, Tr. 1486-87)), and the respective spousal connections, there is sufficient evidence to find that the husbands' business and legal acumen influenced their wives' investment decisions with respect to Perry TV and that finding is made here.

27. Geiger communicated the pertinent information to his law partner and Pierce contacted local persons who would qualify for a minority preference. (Perry TV PFC at 31.) Pierce's first contact was with Dr. Horatio Cabasares, a client whom Pierce had incorporated and advised since 1981. Dr. Cabasares has also been the physician for the Pierce family. Through Dr. Cabasares, Pierce was able to recruit his wife, Lorna Cabasares. (L. Cabasares, Tr. 2161-63.) Mrs. Cabasares then contacted Mr. Dy whom she knew through a Filipino networking group. After a visit with her, Mr. Dy acknowledged that he wanted to participate. (Dy, Tr. 2281-82.) Pierce called Quentin Harvey whom he knew as a high school athlete and a former student of his wife. Pierce told Harvey about the opportunity and Harvey agreed to participate. (Pierce, Tr. 849-51.)[5]

28. As stated above, Mr. Harvey was unable to travel to Washington, D.C. to sign the application on March 17 and so Ms. Denise Ingram was recruited as a substitute. *See* Paras. 14 to 15, *supra*. Harvey's 80% shareholder interest was shared equally with Ms. Ingram and they each became 40% shareholders. The question of fact in contention is whether Harvey knowingly and willingly gave up the 40% interest or was the stock reallocated on instructions from Chase or Pierce. Again, there was no testimony from Harvey on a critical factual point. *See* fn. 5, *supra*.[6] Ms. Ingram testified that it was in May 1988, that she learned from her parents and Mr. Pierce that Harvey had withdrawn from the venture. (D. Ingram, Tr. 56-57.) Ms. Ingram discussed with her parents various ways to redistribute Harvey's stock but she could not recall specifics. Nor did she even attend the shareholders' meeting at which the redistribution was made. (D. Ingram, Tr. 62-64.)

29. Her recollection on specifics was not good. Prior to the business meeting which she did not attend, Ms. Ingram spoke with Mr. Pierce. But she cannot recall specific percentages of stock ownership or position assignments. No mention was made about payment for Mr. Harvey's stock. She recalled discussing with her parents whether Lorna Cabasares might be a director ("yes" to leading question) but she cannot recall who made the suggestion. (D. Ingram, Tr. 65-66.) Her testimony and demeanor did not impart that she was in control of business decisions. She was not sure whether Harvey's retention as business manager was discussed when it was learned that he was leaving. But the decision was made to hire "someone" as business manager. (D. Ingram, Tr. 66.) When the FAA failed to approve the first site, Mr. Pierce located a second site. But she cannot recall whether she instructed him, discussed the subject with him, or whether other principals were involved in directing Mr. Pierce. (D. Ingram, Tr. 68-69.) The amendment was filed on March 18, 1988. *See Order*, FCC 88M-884, released March 29, 1988. She relied on Mr. Pierce's superior resources to locate a new site because of his extensive contacts as an attorney and she did not talk with the property owner. (D. Ingram, Tr. 72-73.) She does not know any of the details such as whether the land will be leased or purchased. (D. Ingram, Tr. 75.) These events concerning Harvey's departure, the reallocation of his stock and the lack of knowledge which Ms. Ingram displayed with respect to a new site selection at a time when she was an

officer, director and 31% shareholder, establish that substantial influence over the Perry TV application remained with Mr. Pierce into March and April 1988, a year after the corporation was formed.

30. Denise Ingram's parents became interested shortly after March 17, 1987, the date that Denise joined the venture. (H. Ingram, Tr. 1922.) Ms. Ingram did not contact anyone with voting control about her parents' interests in joining. Nor did she contact other directors or officers. She first contacted Mr. Chase who in turn discussed the subject of her parents' participation with Mr. Pierce who also spoke with Mr. Ingram about the venture. (*Id.*) Mr. Ingram spoke briefly with Ms. Cabasares and Mr. Dy before signing a binding commitment but only to advise them that he would be joining the group. He did not discuss the number of shares of stock he would subscribe for. (H. Ingram, Tr. 1922-24.) He did not discuss costs with Dy or Cabasares. Costs were discussed with his daughter but not with Chase who was concerned that the Ingrams join by the "B" cutoff, April 16, 1987. (H. Ingram, Tr. 1924.) The deposition of Mr. Ingram contradicts his hearing testimony in certain respects but his testimony will not be entirely rejected. [7] According to his prior deposition testimony, he had not spoken with Dy or Cabasares before he signed the subscription agreement. (RP Exh. 39 at pp. 4-6.) He also admitted in his deposition that at the time he signed the subscription agreement all others had signed before him. He signed alone in Mr. Pierce's office. (RP Exh. 39 at pp. 2-3.)

31. Mrs. Ingram first learned of the venture in late February or in early March when her daughter called home from Washington, D.C. (C. Ingram, Tr. 2047.) Catherine was not sure whether Denise had joined the venture at that time and nothing more was discussed other than there being an opportunity to join a group that would be seeking a TV station in Perry. (C. Ingram, Tr. 2047-48.) Mrs. Ingram relied on her husband's judgment. She did not make any independent inquiry of other subscribers or of counsel before she signed the subscription agreement dated April 16, 1987. (RP Exh. 14, C. Ingram, Tr. 2053-56.) Mrs. Ingram testified that she had a general recollection of a group discussion about becoming a director but she had lost her specific recollection of what was said. (C. Ingram, Tr. 2070.) She had not spoken with Dy, Cabasares or Harvey before she subscribed. (*Id.* at Tr. 2070-72.)

32. In early May, 1988, Harvey decided to leave the venture because of unspecified "difficulties" that faced him. (H. Ingram, Tr. 134.) That event would require a reallocation of his 31% voting stock interest and the appointment of a new president. (L. Cabasares, Tr. 110.) A meeting was called for May 13, 1988, and communication was initiated by Pierce's office to Hervia Ingram. (H. Ingram, Tr. 134.) All voting shareholders, officers and directors attended the meeting at Pierce's office, except Quentin Harvey and Denise Ingram. (D. Ingram, Tr. 60.) Denise Ingram testified that she was told by her father Hervia of the outcome of the meeting: Lorna Cabasares received an additional 21% making her share 31% (she became a U.S. citizen); Catherine and Hervia Ingram each received an additional 5% increasing their shares to 14% each. (D. Ingram, Tr. 60.) In addition, Hervia Ingram was elected President and General Manager and Lorna Cabasares was elected VicePresident, Assistant Secretary and a Director. (Dy, Tr. 158.)

33. Denise Ingram's account is accepted as accurate, even though her father contradicted her testimony that he told her afterwards what was decided at the meeting. He said she participated by telephone. (H. Ingram, Tr. 135.) But that is rejected because none of the other witnesses support that contention. Also, it is established that Chase attended the meeting from 9 a.m. to 4 p.m. (with a break for lunch) and he outlined at the beginning what was to be accomplished and how it would be done. (Dy, Tr. 153-154.) Cabasares testified that Chase was not in the room when all decisions were made but Dy testified that Chase was in the meeting all day. (Cabasares, Tr. 113-114, Dy, 153-154, 166.) Pierce was in the meeting at regular intervals (L. Cabasares, Tr. 109) and Pierce took an active role in collecting checks for Chase's fees. (Dy, Tr. 158-160.) Apparently, Hervia and Catherine Ingram were told by Pierce in early May about Harvey's intent to resign but the only resignation document seen by any of the stockholders at that time was a document retained by Pierce at his office. (H. Ingram, Tr. 135; C. Ingram, Tr. 174.) Although percentages were discussed at the meeting and Hervia Ingram was to have a leadership role, he could not recall who suggested the percentages. (H. Ingram, Tr. 135.) Also, Mr. Ingram recalled that it was Pierce who outlined the procedures at the beginning of the meeting and Pierce would come back to see if he could be of help. (H. Ingram, Tr. 136-137.)

34. A Petition For Leave To Amend was filed by Perry TV on December 15, 1988. It reported that Harvey had withdrawn from the venture. Perry TV sought to report the disposition of his 31% stock interest. The amendment was not accepted because the petition was not supported by corporate documents. *See* Order, FCC 89M-318, released January 31, 1989. Ultimately, the documents were assembled and the amendment was accepted. *See Order* FCC 89M-958, released March 24, 1989. The changes were testified to be Denise Ingram in the early stages of the comparative case. (D. Ingram, Tr. 46-47.) According to documents submitted with the amendment, Harvey tendered his written resignation on May 2, 1988. There was no reason or explanation stated. Since no evidence was offered by Perry TV on Harvey's role in the application, his role will be presumed to have been under the influence or control of Mr. Pierce and he will be presumed to have played no role in the preparation of the application.[8]

35. To summarize, the above facts (Paras. 11 to 34) support ultimate findings of fact that from March 17, 1987, to the present, Geiger & Pierce and Chase have exercised substantial influence or control over corporate decisions concerning new voting shareholders, the reallocation of shareholdings, and the assignment if management positions for integration. All decisions about the redistribution of Harvey's shares were made in proximity to Pierce and there is no direct evidence which would counter Pierce's evident influence. In addition, the facts are considered in light of the earlier facts that Chase, Pierce and Geiger acted as sole promoters up to the time of incorporation. Pierce recruited voting shareholders who met the preference paradigm outlined by Chase, and then Pierce arranged for a bank commitment letter and antenna site selections. There was little else for the voting shareholders to do. But there is no evidence that the non-voting preferred shareholders were "fronting" for Pierce and Geiger because they had no ability to even secretly control decisions and they were never intended to

be anything more than investors. However, the preferred protections for their investments and loans, in which their husbands had at least spousal interests, were controlled by their husbands through Geiger & Pierce, P.C. acting as corporate counsel and the individuals, Messrs. Pierce and Geiger, were thereby able to fulfill, through their spouses, their incentives to invest.

36. As further evidence of control, the initial financing of the venture shows that control was retained by Messrs. Pierce and Geiger until the case was set for hearing in September 1987, a date subsequent to the "B" cutoff date. In March 1987, Geiger & Pierce, P.C. paid the incorporation filing fees and the local publication fees. (RP Exh. 21.) On March 16, 1987, a check was drawn on the James N. Geiger or David M. Pierce "investment account" payable to Perry TV in an unspecified amount noted as "loan for retainer." (RP Exh. 21.) Geiger & Pierce, P.C. also advanced $6,000 on September 17, 1987, for the FCC hearing fee. (RP Exh. 21.) Payments finally began to be made by the subscribers for their share subscriptions for Perry TV stock on September 16, 1987, approximately one week after the case was designated for hearing. Between September 1987 and May 1988, all shareholders paid in a total of $24,950 for stock purchases and loans. Between June and November 1988, Mrs. Pierce and Mrs. Geiger paid in an added $2,000 each. (Jt. Exh. 1 and RP Exhs. 24A-29A.) Those payments were deposited in Perry TV's checking account that had been opened at the Bank of Perry on March 17, 1987. (Perry TV Exhs. 17, 18.) The authorized signators on that account were Quentin C. Harvey and Denise Ingram.

37. It is found based on the evidence in this case that the Share and Loan Subscription Agreements executed on April 16, 1987, were actually executed in September 1987. (Pierce, Tr. 972-73.) The discrepancy was discovered when Pierce was confronted with his time cards for September 29, 1987, whereon he recorded " phone call to Quentin to arrange signing of corporate documents; meetings with principals to sign." Pierce explained that there had been errors in the firm's processor which went unnoticed until September at which time the errors were corrected and the documents were reexecuted in Pierce's law office. (Pierce, Tr. 972-73, 1047.) The finding that the documents were executed in September 1987 is further supported by the absence of time cards for April 16, 1987, coupled with Pierce's practice to keep time cards for the legal work done for Perry TV by the Geiger & Pierce law firm. It appears that corporate documents were still being executed in September 1987 in an effort to shore up integration.

Meetings Between Register, Geiger and Pierce

38. Register decided to talk to Geiger, who he previously knew, about a settlement which might involve one party paying off the other, or a merger. (Register, Tr. 2482-83.) There were prior business relationships which in part motivated the meeting. Geiger's law firm had organized Radio Perry about 20 years ago and in 1968, Register and Geiger were each 20% investors in a cable television venture in Perry. (Register, Tr. 2564-65, 2460-66.) Register's counsel concurred in the decision to begin discussions and after a Kiwanis meeting which both had attended, Register asked Geiger to meet with him. (Register, Tr. 2484.)

39. Register went to the Geiger & Pierce law offices on September 23, 1987 to talk. They also later met on October 15, 1987. Both of these meetings were obviously for the purpose of exploring settlement possibilities, a recognized fact-of-life in any litigation. But it cannot be concluded from the evidence that either of these meetings involved more than exploratory probes which never reached the level of negotiations. There were two memoranda of the meetings that Register prepared soon after the event which were received in evidence. (RP Exh. 34.) Counter affidavits were prepared by Pierce and Geiger. (RP Exh. 33.) Nothing conclusive can be derived from the opposing affidavits or from the testimony except that Pierce and Geiger were substantially engaged in the prosecution of Perry TV's application and were exercising control over a key aspect of the case, i.e., possible settlement. They were the local corporate lawyers[9] but they felt they had the authority to participate in such significant discussions that could effect the outcome of the litigation without Mr. Chase's presence and without first consulting the officers/voting shareholders for instructions as to set parameters for settlement.[10] As described in the preceding note, Hervia Ingram, later to replace Harvey as president, testified that when he told Pierce that he was not interested in dismissing Perry TV's application he was only stating his own opinion and he was not speaking for the corporation or the other shareholders. (H. Ingram, Tr. 2042.)

40. The evidence of both parties with respect to the specific statements of the respective persons at the meetings is uncorroborated hearsay which lacks sufficient quality to make specific findings. Register left the first meeting thinking he had a settlement possibility while Pierce and Geiger did not conclude that the discussion had risen to that level. Pierce and Geiger concluded that the second meeting raised nothing of substance and was almost exclusively limited to expressions of Register's anger that Perry TV was seeking the permit after Register had succeeded in getting the allocation. But as indicated above, the fact that Pierce and Geiger twice met alone with Register and assumed lead roles without any meaningful consultation with shareholders constitutes substantial evidence that Pierce and Geiger were in control of the application during those two meetings.

Common Ownership

41. If the permit were granted to Radio Perry, the applicant would have common ownership interests in two broadcast media in the Perry coverage area. This issue was added by the Bureau. *See Hearing Designation Order*, *supra* at Para. 7. Radio Perry has the burden of proof to show that common ownership is consistent with the Commission's rules and if not, that it would be in the public interest for Radio Perry to own two broadcast outlets. Perry's case was presented through its controlling principal, Lowell Register. His testimony is received as the testimony of an interested party and not as an expert. However, it is acknowledged that based on his broadcast experience and his first-hand involvement with this application and the radio properties, Mr. Register is found to be competent to testify and offer proof on the issue.

42. Register has owned and managed radio stations WPGA(AM) and WPGAFM in Perry for approximately 28 years and in the last 14 years as their 100% owner. (RP Exh. 3.) Register contends that he sought the allocation of the new TV Channel 58 because he felt that Perry

could benefit from a new outlet. Since Register applied for the station he must have considered the economics of common operations. Thus, he is competent to testify on his analysis. In that regard, Register's thesis is as follows:

> [T]he new station I have planned will be able to survive from an economic standpoint only if it uses relatively modest technical facilities to carve out a local viewership, while relying on Radio Perry, Inc.'s existing personnel and physical plant to provide experience, expertise and operating efficiencies.

(PR Exh. 3.)

43. Register belongs to Perry's Chamber of Commerce, Kiwannis Club, and Hotel-Motel Tax Advisory Committee. He relies on these associations, his own experience in building broadcast facilities and his own involvement in UHF-TV stations in reaching his conclusion:

> that only a station which recognizes the limitations imposed by the size of the local population and the existence of established network stations and cable services will survive.

(RP Exh. 3 at 2.) Register relies on his broadcast experience to support these conclusions.

44. His broadcast experience includes part-time work in 1951 at Station WFPM, Fort Valley, Georgia. (RP Exh. 2.) Then he moved to Station WRPB, an AM daytime station in Warner Robbins, Georgia, where he worked fulltime as announcer and in advertising sales. In 1957, he did similar work at a new station under construction at Alma, Georgia which Register helped to put on-the-air. (*Id.*) In 1958, he became the general manager of a new Station WCLA in Claxton, Georgia and soon thereafter purchased a 30% interest. Register exchanged that ownership interest for a 40% ownership interest in Station WPGA, Perry where he became general manager. In 1966, Register directed the construction of WPGA-FM and he also helped in securing cable television for Perry. (*Id.*)

45. In 1971, Register left the broadcasting field and developed an outdoor sign advertising business. He returned to broadcasting in 1974 as 100% owner of the WPGA stations in Perry and became president of Radio Perry, Inc. In 1978-79, Register Data Services was founded to develop and market computer programs to handle scheduling, billing and bookkeeping functions for broadcast stations. Register claims that Register Data Services enables small and medium market stations to utilize new technology. The programs developed by Register have been sold to over 500 stations nationwide. (*Id.*)

46. Register has modernized Radio Perry's broadcast facilities. Specifically, he has installed a new transmitter, audio mixing consoles, turntables, tape equipment and remote pickup equipment. Register initiated stereo programming on the AM facility and he obtained a new local weather radar system. (*Id.*)

47. Register asserts that he has learned about the economics of UHF station operations in connection with the operations of Register Data Services which has sold computer logging and billing programs to UHF-TV stations. In support of Register's assertion of an economic need for common ownership in Perry, he refers to WPAN-TV in Fort Walton Beach, Florida that went bankrupt after construction, one of the stations he dealt with.[11] He also relies on non-cited trade press articles in *Broadcasting Magazine* which conclude that "high programming costs and a depressed market have seriously affected the operations of non-network UHF stations." Macon, which is in the coverage area of Radio Perry's Channel 58 signal, has three local television stations that are network affiliates and that place a city-grade signal over Perry. (RP Exh. 3 at 2-3.) Macon also will receive a fourth TV station, a new channel was allocated to Warren Robbins, and an application to construct a new station in Cordele, Georgia has been accepted for filing. (*Id.*) Perry also receives two "off-the-air" signals from Columbia, Georgia and "numerous signals" from seven cable television outlets. (*Id.*)

48. Register asserts that on the one hand, the low return on new TV stations under the above described competition requires the utilization of joint operations and, on the other hand, the considerable competition also serves to prevent monopoly pricing or other non-competitive effects. In support of that contention, Register notes that Radio Perry's two existing stations already compete with 19 other broadcast outlets licensed to Fort Valley, Warner Robbins, Macon, Montezuma, Cochran and Hawkinsville, Georgia. In order to meet that competition through a new UHF station, Register seeks to take advantage of experienced personnel who are working at the radio stations and thereby realize substantial cost savings. (RP Exh. 3 at 4.) Register advances a related public interest argument that common ownership will facilitate directing resources to local programming instead of debt servicing. (*Id.*)

49. The cost analysis submitted by Radio Perry shows that monthly operating expenses for a stand-alone TV station would be $30,975 while those expenses for a combined operation would be $11,000, thereby resulting in a savings of $19,975 per month. The line item analysis preferred by Radio Perry is as follows:

	Monthly Stand - Alone	Monthly Combination
Utilities	$2,500	$ 4,500
Telephones	1,000	on hand
Manager	2,500	on hand
Administrative Salaries	4,000	on hand
Sales Salaries	6,000	on hand
News, Production Air staff Salaries	8,000	12,000
Video Program Expense	5,000	5,000
AP (News Service)	475	on hand
Miscellaneous	1,500	on hand
TOTAL	$30,975	$21,500

(RP Exh. 3, Att. C, p. 35.) The utilities for a combined operation is $2,500 for the TV stand alone plus $2,000 additional for the radio increments in the combination resulting in a total of $4,500. Radio Perry indicated that calculation by adding $2,000 to the combined side. Also, the news staff salaries for the TV stand-alone would be $8,000. The radio broadcast increment would result in a $4,000 add-on thus raising the news production monthly cost to $12,000. With those corrections, the monthly total for the combined radio and TV stations increases from Register's calculated $11,000 to $21,500, an increase of $10,500.

50. Radio Perry specifies the staffing salaries for the radio stations that he contends can also be used for TV service. These are the following:

Radio Position	Salary	TV Asset
Sales	$250 pw	Sales
News	100 pw	News
Oper. Mgr.	325 pw	Traffic
Sales	400 pw	Sales
Off. Mgr.	200 pw	Off. Mgr.
Bookkeeper	500 pw	Bookkeeper
Gen. Mgr.	500 pw	Gen. Mgr.
Engineer	175 pw	Engineer
Promotions	225 pw	Promotions
Anncr.& Prod.	185 pw	Production
Announcer	100 pw	Public Aff.
Announcer	200 pw	Announcer
Sales	400 pw	Sales
Announcer	200 pw	Announcer
News	275 pw	News
Sales	500 pw	Sales
Prog. Dir.	300 pw	Prog.
Announcer	200 pw	Announcer
Prog. Dir.	200 pw	Prog.
Announcer	200 pw	Production
TOTAL	$5,435	

(RP Exh. 3, Att. C p. 36.) (There are ten additional positions which would continue to be used exclusively for radio.) Each of the above-listed 20 positions are full-time positions. Register proposes that those same persons would assume additional TV responsibilities without any increase in salary. (Register, Tr. 430-31, 456.) Due to the evident relationships, it is accepted that the bookkeeper Janice Register ($500 pw), the general manager Lowell Register ($500 pw) and the engineer Lowell Register, Jr. ($175 pw) would continue to work without an increase in pay. (*Id.*) But that assumption cannot be made for the unrelated employees who have not been called to testify.

51. Register also has proferred estimates of construction costs for a stand-alone TV station at $369,000 and for a combined station using the radio station's assets of $174,000. (RP Exh. 3, Att. C; p. 37.) Real estate including land, tower and building at $120,000 would be no cost to the TV station if the combination is used. But the TV station would require a new antenna at $25,000 and a TV studio production package of $69,000 for a total new investment of $94,100 even if the combined facility is utilized. There has been no evidence introduced or proferred by Radio Perry to show that the estimated savings of $120,000 must be realized in order for the venture to succeed.

COMPARATIVE ISSUES

Media Diversification

52. There are no ownership interests in any medium of mass communications attributable to Perry TV nor to any of its principals. (Perry TV Exh. 3.) Radio Perry, Inc., which is owned and controlled by Lowell L. Register, is the licensee of radio stations WPGA and WPGA-FM in Perry, Georgia. (RP Exh. 1.) Thus, Radio Perry has substantial broadcast media interests in the city of license.

Comparative Coverage

53. The parties were required by the Presiding Judge to submit comparative coverage evidence in order to consider the areas and populations within the respective predicted Grade B contours and the availability of other television service of Grade B or greater intensity. *See Order*, FCC 88M-1146, *supra*. The data relied on by the Bureau, taken from Perry TV Exh. 4, is accepted as the relevant data for consideration:

Areas and Populations

	Area (Sq. km.)	Population
Perry TV	22,301	533,205
Radio Perry	7,106	307,915

This evidence establishes that Perry TV's proposal would have superior coverage by factors of 15,195 square kilometers and 225,290 persons.

Other Services

54. Each applicant's uncommon Grade B service area is considered according to the number of other commercial television services presently available:

Other Services Available	Perry TV		Radio Perry	
	Area [sq.km.]	Population	Area [sq.km.]	Population
0	778	9,277	0	0
1	1,742	23,867	0	0
2	593	10,057	0	0
3	846	15,142	0	0
4	3,014	9,184	0	0

This evidence establishes that Perry TV would provide a first service to a white area of 9,277 persons and a second service to a gray area of 23,867 persons. Perry TV would also provide a third and fourth service respectively to 10,057 persons and to 15,142 persons.

Perry TV's Integration

55. Perry TV concedes that its proposal must be evaluated as though Quentin Harvey was still a 31% voting shareholder. But since he has left the venture his 31% interest and proposed integration as general manager will not be counted. (Perry TV PFC at 110.) There are five remaining principals who collectively are credited with 69% of the voting power, each of whom qualifies for a minority preference.

56. Perry TV is a Georgia corporation whose officers and directors are identified above. *See* Paras. 9 to 10, *supra*. There are three members of the Ingram family who plan to participate in management: Hervia M. Ingram, his wife Catherine H. Ingram, and their daughter, Veronica Denise Ingram. The remaining principals for integration are Lorna Cabasares and Alexander Dy. The non-voting preferred shareholders, Susan D. Geiger and Paula H. Geiger, will not be integrated into management. Mr. Chase allocated managerial responsibilities in connection with his draft of the Unanimous Consent document dated April 20, 1987. (RP Exh. 18, Chase, Tr. 715.) Chase called each principal on the telephone and suggested each one's proposed responsibility. (*Id.*) No one rejected Mr. Chase's suggestions.

57. **Hervia M. Ingram.** Mr. Ingram has lived in Perry since 1958. He holds a B.S. degree in agricultural education and M.S. and Ed.S. degrees with majors in

agribusiness and adult education. Mr. Ingram has been the Director of Continuing Education for the Middle Georgia Technical Institute since November, 1984 where he supervises a staff of thirty six. The Institute serves five counties in middle Georgia. He taught in the Houston County school system from 1958 to 1984 and he plans to retire from the school system in June, 1989. (H. Ingram, Tr. 1987.)

58. Mr. Ingram has been a member of Perry's City Council since 1984, a member of the Houston County Chapter of the NAACP for 22 years, and a member of the Perry Civic League from 1974 to date. The League is a group of Black leaders who work to improve conditions in the Black community. Mr. Ingram is also appointed to the City of Perry's Area Planning and Development Commission. That is an agency operating with state and federal funds and working to improve housing and to bring new businesses and industries into the area on which he has been serving since 1985. And in the period 1980 to 1984, he served as a Scoutmaster and Troop Leader of the local Boy Scouts and as a consultant for the local Girl Scouts. (Perry TV Exh. 5.)

59. If the application of Perry Television is granted, Mr. Ingram will resign or retire from his position with the Middle Georgia Technical Institute by June 1989. He also will resign as a member of the Perry City Council, and will become employed fulltime (at least 40 hours per week) as the General Manager of the station. In this capacity, he will manage and direct all the operations of the station, in part through department heads. Mr. Ingram is a Black male. (Perry TV Exh. 5.) Mr. Ingram claims no credit for prior broadcast experience.

60. Mr. Ingram was aware of the departments at the station (sales, programming, business, news and public affairs, community relations) but he was not informed on personnel staffing needs. (H. Ingram, Tr. 126-28.) He did not have any meaningful discussions with other shareholders or with Chase about the allocation of duties. (H. Ingram, Tr. 1977-80, 1982.)

61. **Catherine H. Ingram.** Mrs. Ingram has lived in Perry, Georgia since 1963. She has an A.B. degree in secretarial science from the Morris Brown College at Atlanta, Georgia. She has been employed as an administrative secretary in the Perry Middle School since 1968. If the application of Perry Television is granted, Mrs. Ingram will resign from this employment to assume the fulltime position of Director of Public Affairs and Community Relations at the television station, working at least 40 hours per week. In this capacity, she will (1) manage and develop the presentation of public affairs programs on the station, *i.e.*, programs involving talks, commentaries, and discussions on issues of public importance; and (2) she will ascertain the purposes and needs of community organizations and arrange for the production and broadcasting of their public service announcements. Mrs. Ingram claims no credit for prior broadcast experience.

62. Mrs. Ingram has been a member since 1974, and at various times has served as the President, the Secretary, and the Treasurer of the Houston Association of Educational Office Personnel. This organization offers scholarships to students in the three local high schools, assembles baskets of food for the needy at Thanksgiving, and provides gifts to the needy at Christmas. Mrs. Ingram also has been a member of the local chapter of the NAACP for at least 10 years, has sung in the choir at the St. James CME Church in Perry since 1976, and has been a member of the Missionary Society, a group of Church members that provides food and clothing for the needy. Mrs. Ingram is a Black female. She does not claim any credit for past broadcast experience. (Perry TV Exh. 8.)

63. Catherine Ingram had not formulated an idea of the personnel or finances needed to carry out her proposed managerial functions. (C. Ingram, Tr. 178-79.) She did not even discuss her plans for the station's public affairs and community relations programming with other principals. (*Id.*) She felt that she had taken on those managerial responsibilities based on discussions with Mr. Chase and telephone discussions and a meeting with other principals. (C. Ingram, Tr. 2097-99.)

64. **Veronica Denise Ingram.** Ms. Denise Ingram was born in Fort Valley, Georgia, a community that is located approximately 12 miles outside the city limits of Perry. She has been a legal resident of Perry since 1964, but from October, 1983 to date has had a residence in the Washington, D.C. area for the purposes of her employment. She regards the Washington residence as temporary because she is employed as a legislative assistant in the office of the member of congress who represents the district from which she comes and where she still maintains her legal residence. (Tr. 91.) She continues to hold a Georgia driver's license and she has continued to vote in Georgia. (Tr. 99-100.) Ms. Ingram has a Bachelor of Business Administration degree from the Georgia Southern College, at Statesboro, Georgia. She has been a member of the St. James CME Church in Perry since childhood. (Tr. 1749.)

65. If the application of Perry Television is granted, Ms. Ingram will resign her current employment and she will resume a fulltime residence in Perry. (D. Ingram, Tr. 91-92.) She will then occupy the fulltime position of Program Director at the television station. She will serve for at least 40 hours each week in managing and directing the selection, acquisition, production, and presentation of programs for broadcast and she also will develop and maintain the program schedule. (D. Ingram, Tr. 85.) Ms. Ingram is a Black female. (Perry TV Exh. 2.) She does not claim any credit for past broadcast experience.

66. Denise Ingram was assigned responsibility as Program Director. (Perry TV Exh. 2.) But she testified that she had no idea how many people she would need to supervise or how time would be allocated. (D. Ingram, Tr. 8586.) She had no insights into program production and had not formulated any budget needs. (D. Ingram, Tr. 86-88.) She had not discussed programming with others, never gave much thought to the subject of programming, and she does not have even a general plan for developing and maintaining a program schedule. (D. Ingram, Tr. 98.)

67. **Lorna Cabasares.** Ms. Cabasares was born in nebu, the Philippines. She resided in Macon, Georgia, a community within Perry Television's proposed City Grade service area, from 1975 to 1981, and she has resided in Perry, Georgia from 1981 to date. Ms. Cabasares is a Registered Nurse. (Cabasares, Tr. 2213.) She has a B.S. degree in nursing from the Velez School of Nursing in Cebu, the Philippines. She has been employed since 1981 as her husband's office manager, a practicing physician in Perry. She also maintains the books for his medical practice and she substitutes for other staff members when they are off. She is paid a salary for her work. (Cabasares, Tr. 2158.) If the application of Perry TV is granted, Ms. Cabasares will resign her current position and become employed full time (at least 40 hours per week) as the

News Director of the television station. Her role will be to manage the organization, preparation, and presentation of news programs at the station, including local, regional and national news.

68. Ms. Cabasares has been a member since 1981, and the President since 1986, of the Council of Catholic Women of the Perry Parish. This organization provides a variety of services in the funding and operations of the local Catholic Church and it also works with other church organizations in the community in raising funds for community needs, assembling Christmas gifts for needy families, and assisting migrant workers with food, blankets, clothing, and language training. Ms. Cabasares is a female of Filipino heritage. (Perry TV Exh. 6.) Ms. Cabasares does not claim any credit for past broadcast experience.

69. Ms. Cabasares is proposed as the station's News Director. She was recommended for the job by Chase and she did not discuss the list of positions with other principals. (Cabasares, Tr. 2197-98, 2233.) She was unaware of staffing and budget needs for a news director and she has not considered the apportionment of time for local news and national news. (Cabasares, Tr. 119.)

70. **Alexander Dy.** Mr. Dy was born in Butuan, the Philippines. Since 1980 he has lived in Warner Robins, Georgia, a community located approximately 15 miles outside the city limits of Perry. Warner Robins is located within Perry TV's proposed city grade service area. Dy has had four years of college at four different institutions: Xavier University at Cagayan De Oro, the Philippines; Atenuo De Davao, at Davao, the Philippines; Urios College, Butuan, the Philippines; and Macon Junior College at Macon, Georgia. Mr. Dy was a salesman with the Security Life Insurance Company at Macon, Georgia, from 1980 to 1984. From 1984 to 1988, he was a senior salesman at the Regency Nissan automobile agency in Warner Robins, Georgia. From 1988 forward, he has been employed as the Business Manager of Hughes Honda, an automobile dealership in Warner Robins, Georgia. His functions are to approve credit for persons purchasing cars, to provide extended warranties on cars sold in the agency, and to sell life and disability insurance in connection with the car sales. He is also in charge of the dealership's bookkeeping operation. He is responsible to the general manager at the agency. He also functions as the sales manager when the sales manager is away.

71. For the past year, Mr. Dy has been a member of Asian Pacific, an organization in the Warner Robins area that raises funds for charitable organizations such as the Heart Fund. He has been a member of the Sacred Heart Catholic Church in Warner Robins since 1980. If the application of Perry Television is granted, Dy will resign his current employment and will occupy the fulltime position (at least 40 hours per week) of General Sales Manager of the television station. In this position, he will direct and supervise the selling of time on the station for commercial announcements involving local, regional and national advertising. Dy is a male of Filipino heritage. (Perry TV Exh. 7.) Mr. Dy makes no claim for credit for any past broadcast experience.

72. Mr. Dy had not considered or discussed the number of people who may be needed in the general sales department, or the amount of his budget needs. He agreed to assume the job of General Sales Manager at Chase's suggestion and he had no discussions with other principals about managerial positions before the assignments on April 20, 1987, under the Unanimous Consent. (Dy, Tr. 162, 2343-45; RP Exh. 18.)

Radio Perry's Integration

73. **Lowell L. Register** is the 100% shareholder and President of Radio Perry, Inc. In 1951, his family moved to Warner Robbins, Georgia where he attended local schools through 1954. Mr. Register has resided in Perry, Georgia continuously since 1960. (RP Exh. 2.) His experience in broadcasting and his involvement in local civic activities are described in detail above and those findings are incorporated here. *See* Paras.42 to 46, *supra*. His wife Janice Register is a director of the company and she has served as its Secretary and Treasurer since 1974. (Register, Tr. 382-85, 389-90.) While there was some question about whether Janice Register's directorship had been documented, Mr. Register testified that she had been a director since 1974 and he intends that she continue to serve as a corporate director. (Register, Tr. 386-87, 450-51.) There was no evidence introduced to show that Mrs. Register was merely a " *pro forma* " director and therefore it is found that she shares in the control of Radio Perry, Inc. with her husband. She has check-signing authority which she regularly exercises and she has line authority over station operations. (Register, Tr. 410-16; 453 and Tr. 422.)

74. Register's business interests are local, family operations. Mrs. Janice Register, his wife, is Secretary-Treasurer of Radio Perry and she is the financial controller for Radio Perry's broadcast stations. Register's daughter is involved in Radio Perry's accounting, payroll and public relations. She also performs those services for Register Data Services. *See* Para. 45, *supra*. Register's son has space in Radio Perry's office for an unrelated air delivery service and the son's wife is an account executive for Radio Perry's advertising accounts. (RP Exh. 2 at 5.) But there is no evidence which shows that the daughter, the son or the daughter-in-law participate in control over the radio stations.

75. If Radio Perry's application is granted, Register will serve fulltime (at least 40 hours per week) as General Manager. His duties will include supervision of the station's overall operation, including its programming, sales and internal administrative activities. Register represents that he will limit all other business activities that would otherwise interfere with his full-time commitment to Channel 58. (RP Exh. 2.)

76. The evidence establishes the ultimate facts that Perry has been a long-time resident of the Perry, the city of license, and he has substantial broadcast experience. He claims no minority preference.

CONCLUSIONS OF LAW

77. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standards in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, (Policy Statement), 1 F.C.C. 2d 393 (1965).

78. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984) (process of comparative evaluation). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership into management which may be enhanced by local residence, civic activities, broadcast experience and, if applicable, minority and female gender preferences. However, before conducting the comparative analysis, a determination of the basic qualifications of each party first must be made. *Louis Adelman*, 28 F.C.C. 432 (1960), *recon. denied*, 29 F.C.C. 1223 (1960), *aff'd sub nom Guinan et al*, v. *F. C. C.*, 297 F.2d 782 (D.C. Cir. 1961).

BASIC QUALIFICATIONS

Air Hazard Issues

79. It is held as a matter of law that each of the applicants has met the issue designated to determine whether the tower height and the location which each has proposed would constitute a hazard to air navigation. *See Hearing Designation Order*, *supra* at Para. 7 (Presiding Judge to determine with respect to applicants whether there is a reasonable possibility that the proposed tower height and location would constitute a hazard to air navigation). *See also* Findings at Para. 7, *supra*. Factual determinations are made by the FAA that no hazard to air navigation will occur at the designated sites. It is well established that FAA determinations of no air hazard preclude the need for any further inquiry and, in the absence of any substantial evidence to the contrary, such determinations are conclusive as a matter of law. *Southern Capital Television, Inc.*, 47 F.C.C. 2d 197 (1974). *See also Adirondack Television Corp.*, 5 F.C.C. 2d 172, 174 (Review Bd 1966).

Party - In - Interest

80. The evidence in this case establishes that Chase, Pierce and Geiger were the promoters of the Perry TV venture which they collectively controlled up to incorporation on March 17, 1987, the same day as the application. Almost a month to the day, April 16, 1987, the "B" cut-off, shareholders interests of both voting and non-voting principals were allegedly finalized in unanimous consents and subscription agreements. In fact, those shareholders documents were not executed until September 1987. It was not until April 20, 1987, that an initial designation of managerial positions were assigned. Thus, by "B" cut-off Perry TV's proposal was not complete.

81. Chase selected the managerial titles and they were assigned to individual voting shareholders by Chase in separate conversations and without meaningful discussion. The persons selected for managerial positions did not fully comprehend their needs, duties and responsibilities and none of the principals had any broadcast experience to rely on. Other key duties were undertaken by Pierce without consultation with Perry TV management. Pierce obtained a bank letter and Pierce twice found and obtained antenna sites without needing any approval. And amidst all this organizational activity controlled by the three promoters, Pierce, with the assistance of Chase, structured articles of incorporation and by-laws which gave highly favorable preference and protection to the investing non-voting shareholders who were the spouses of Pierce and Geiger.

82. The evidence further establishes that the wives became investors within a month after incorporation for the respective benefits of Pierce and Geiger who felt that they could not participate in an equity investment for ethical considerations and because the Commission's rules would attribute their equity interests for integration purposes since they were acting as counsel. But Mrs. Pierce and Mrs. Geiger were not merely serving as conduits for their respective spouse's investment interests. Each was serving as a coinvestor and, as in the past, each relied on their spouse's business judgment for the investment's success. For their participation in the investment, Mrs. Pierce and Mrs. Geiger were willing to put up their assets, most of which were jointly owned with their husbands. These conclusions are consistent with the expressed interests and desires of Pierce and Geiger to invest in the Perry TV venture for as successful lawyers in the Perry Community and having no background or experience in broadcasting there was no indication that Pierce and Geiger would later personally operate the station on a day-to-day basis. *Compare Religious Broadcasting Network, et al.*, 3 F.C.C. Rcd 6216, 6217 (Review Bd 1988) (attorneys' likely future roles in future affairs of applicant deemed relevant).

83. Since control is established in Chase, Pierce and Geiger and since there is no firm integration proposal there will be no credit awarded for Perry TV's integration proposal. *Compare Doylan Fortney, et al.*, 3 F.C.C. Rcd 6330, 6331-32 (Review Bd 1988). There, a limited partnership and a corporation were organized by counsel who took limited partner and non-voting stock interests and who actively involved themselves in decisions of the applicants. In the case of the corporate applicant Maricopa, the Review Board held:

> Exhibits [received in evidence] show his [counsel's] central role in structuring of the corporation. Applying the Commission's policy views, we hold that these interests cannot be deemed passive, they must be attributed, and therefore substantially reduce [the] maximum integration credit.

Id. at 6332. In that case, the equity owners were the attorneys who had structured the ventures. The Review Board noted that in those situations where attorneys hold equity interests in an applicant and simultaneously perform legal services their equity interests are not deemed to be passive investment interests. *See Mark L. Wodlinger, et al.*, 3 F.C.C. Rcd 3139 (Review Bd 1988). The result would be no different where, as here, Mrs. Pierce and Mrs. Geiger represent the communal interests of their respective lawyer-spouses' investment interests in the Perry TV venture and those lawyerspouses were actively involved in structuring the corporation in a manner that is most favorable to the spouse-investors.

84. Also, in view of the control of Pierce and Geiger over the voting shareholders who were solicited by Pierce, and who relied on Pierce to obtain financing and an antenna site, the 50% combined equity interests of Mrs. Pierce and Mrs. Geiger are attributed to the Perry TV integration. Since Perry TV must discount an additional 31% attribution for Quentin Harvey's post "B" cut-off departure, Perry TV could only qualify for 19% integra-

tion through the three Ingrams, Cabasares and Dy. But the evidence here establishes that the principals proposed for integration are so "passive," "unfocused" and "unknowledgeable" that their proposed integrations will not be credited. *See Utah Television Associates*, 102 F.C.C. 2d 1470, 1478-79 (Review Bd 1985). *See also Jarad Broadcasting Co., Inc.*, 1 F.C.C. Rcd 181, 183-84 (Review Bd 1986) (credit reduced for passivity and lack of knowledge about significant aspects of the proposal). *Compare* the findings above at Paras. 57 to 72. Each of the proposed managers was selected by Mr. Pierce based on advice from Chase concerning minority preferences. They were not selected for any specific business experience or for even an indication of an interest in broadcasting. None of the proposed managers had given any thought to how many persons would be needed to run the day-to-day operations of their respective departments and budgets were not even considered. Also, each was chosen in separate conversations with communications counsel without any deliberative consideration given as a group to how each would interact with others and what would be the chain of command. None of the proposed managers had any broadcast experience which could make up for the lack of attention given to the assignments of managerial responsibilities by Chase. Also, there was a reassignment of positions when Quentin Harvey left in May 1988. For that purpose, Chase appeared at the Geiger and Pierce law offices, was there throughout the realignment discussions, and Pierce would check from time to time on progress. Chase was relied on by the voting shareholders for recommending the new positions and no one disagreed with Chase's assignments. The absence of stability in the original proposal is an additional ground for rejecting integration. *See Signal Ministries, Inc.*, 104 F.C.C. 2d 1481, 1497 n. 16 (Review Bd 1986).

85. The total control of counsel over the filing of the application also presents substantial circumstantial evidence. By March 17, 1987, Perry TV needed to file its Form 301 or be forever barred from consideration. It was learned on March 16 that Quentin Harvey would not be available and so Mr. Pierce contacted Denise Ingram who was working in Washington, D.C. She went to Chase's office on March 17 knowing virtually nothing about such significant matters as costs of the application's prosecution, costs of construction and the business experience of other principals such as Mr. Dy. Yet she signed the application on March 17 at Chase's office in total reliance on Mr. Pierce and Mr. Chase. *Compare Doylan Forney, supra* at 6331 (principal knew little about partners and business plan when she signed application and she was awarded no integration credit).

86. If there is any doubt about Pierce and Geiger's *de facto* control based on the evidence recited above, the specific protective features of the corporate structure are additional grounds for finding control in Pierce and Geiger. The articles of incorporation were drafted by Pierce before he solicited the voting shareholders on April 16, 1987, as financially committed shareholders. Pierce was able to obtain voting shareholders to agree that Perry TV would pay $150 per share for non-voting stock in 1992 before there was any record of earnings or even before *pro forma* financials were presented. To assure that the money was available, under Pierce's construct, while Perry TV would be facing an estimated $3 million in construction and operating costs, the corporation would immediately set up a "sinking fund" wherein twice yearly there would be deposits made equal to 10% of net profits after the nonvoting investors received dividends. Notwithstanding such a one-sided guaranty the voting shareholders agreed to invest and make loans for Perry TV on the advice of Geiger & Pierce, P.A. Finally, if all the protections for dividends failed and Perry TV was unable to meet two successive semi-annual dividends, the preferred shareholders receive one vote for each share of non-voting stock. Thus, Mrs. Pierce and Mrs. Geiger each would receive 125 voting shares and cumulatively they would together control 250 shares of voting stock. That would result in equal control of the voting stock which would be the same as numerical control since at least one vote of the 250 votes would be needed to conduct business. Since it is doubtful that earnings in the first year of operations would produce dividends, a transfer of control is a foreseeable likelihood. And so as to assure that this residual voting power is not later withdrawn by the voting shareholders, the by-laws, which Pierce prepared with assistance from Chase, provide that there will be no changes made to the articles of incorporation that would be to the detriment of the preferred stockholders. Since the potential for control in the preferred shareholders will always be present, including the power to terminate the corporation if dividends are not paid in any one year, the voting shareholders probably would be receptive to business suggestions of Pierce and Geiger. *Compare Doylan Forney, supra* at 6332; *Family Media, Inc.*, 102 F.C.C. 2d 752, 756-57 (Review Bd 1985); *Susan S. Mulkey*, 3 F.C.C. Rcd 590, 592 (Review Bd 1988); and *Progressive Communications, Inc.*, 3 F.C.C. Rcd 5758, 5761 (Review Bd 1988) (Commission will award no decisive comparative credit for flawed ownership proposals).

87. The exercise of that power through Pierce and Geiger is illustrated in two specific instances: First, before the voting common stock shareholders were brought in, Pierce as promoter was able to commit the Perry TV corporate entity to highly favorable conditions for the preferred shareholders, including a "sinking fund," and ultimate voting control which would include the power of the preferred shareholders to liquidate the corporation if there were two dividend delinquencies. A leading commentator has noted the following with respect to preferred shareholders:

> [R]ights of preferred shareholders and bondholders - - - are a matter of contract. For a draftsman, the security is whatever he chooses to make it.

Carey, Corporations Cases and Materials at 1177-78. Here, in an exercise of control over the obligations of the corporation, Pierce created the contract right for the investor-spouses in the manner in which he chose. The contract was fully executed when Quentin Harvey signed the Consent of Director in Lieu of Organizational Meeting on March 17, 1987. (RP Exh. 8.) But Harvey was never produced as a witness to testify as to how much had been explained to him by Pierce and whether he even read the articles of incorporation and the by-laws. In fact, Harvey's signature had to have been obtained in advance of March 17 because all documents executed that day were signed in Mr. Chase's office by Denise Ingram. Recall that Quentin Harvey could not be located on March 17, 1987, and the day before, and so it became necessary to substitute Ms. Ingram. As for a "sinking fund" to insure dividends, the authorities advise that such

a provision would be created for holders of debt securities (no voting rights and stated maturity date) as contrasted with preferred shares of stock. The "sinking fund" where debt is concerned permits a "gradual reduction of the amount [of debt] outstanding" which may be accomplished by "serial maturities" or by a "sinking fund." *Id.* at 1180. But because of the control that Pierce held he was able to secure a feature that is reserved for debt instruments in order to assure dividend payments to the investor-spouses. This obligation to set up a "sinking fund" for dividends would be contrary to the interests of a start-up venture, such as a TV station, which needs in its beginning operations the use of its cash for capital investment. Second, Pierce and Geiger met twice with Register on September 22 and October 16, 1987, wherein exploratory discussions were held which could have led to settlement negotiations. There was no effort to bring Chase into those discussions who had been retained by the corporation as its communications counsel. Nor was there any coordination with Mr. Harvey or with other voting shareholders to obtain instructions. Such circumstances illustrate the total independence that Messrs. Pierce and Geiger were exercising on behalf of the venture.

88. It is concluded that the record evidence taken as a whole demonstrates that Pierce and Geiger, with the assistance of Chase, exercised such dominion and control over Perry TV that Perry TV is not entitled to receive any integration credit. *Washoe Shoshone Broadcasting, et al.*, 3 F.C.C. Rcd 3948, 3955 (Review Bd 1988) (alleged "passive" investor dominated and controlled enterprise by dictating crucial terms of governing documents and no integration credit was awarded). *Compare N. E. O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986) (non-owner husband was found to control 100% owner wife in all decisions regarding application and corporate structure and applicant was not credited with integration) and *Progressive Communications, Inc.*, 3 F.C.C. Rcd 5758, 5761-62 (Review Bd 1988) (where husband withdrew entirely from the venture but continued to participate in decision and influence wife no integration was awarded). The decision to withhold all integration credit for Perry TV is further supported by the evidence analyzed above showing that the principals who were proposed for integration were unprepared to assume managerial roles. *See* Paras. 57 to 72, *supra*.

89. However, the qualifying issue to be determined here is whether Pierce and/or Geiger is a real party-in-interest and, if so, whether Perry TV misrepresented its application to the Commission or was lacking in candor. The test for determining whether a person is a real party-in-interest is whether that person has an ownership interest or is or will be in a position to actually or potentially control the operation of the station. *KOWL, Inc., et al.*, 49 F.C.C. 2d 962, 964 (Review Bd 1974). The language with respect to "operation of the station" is key to the issue. *See San Joaquin Television Improvement Corp.*, 2 F.C.C. Rcd 7004, 7008 (Review Bd 1987) (evidence fails to show that Peoples Foundation would provide financial support or would become involved in operation of the station). A family relationship alone does not warrant an issue and so the husband-wife relationship does not resolve the issue. *See Jimmie H. Howell*, 46 F.C.C. 2d 50 (Review Bd 1974). Nor will the lack of broadcast or business experience of Mrs. Pierce and Mrs. Geiger support a finding against Perry TV as real party-in-interest, particularly since neither Pierce nor Geiger have broadcast experience or any intention to leave the practice of law to operate a broadcast station. *Compare Cannon's Point Broadcasting Co.*, 93 F.C.C. 2d 643, 651 (Review Bd 1983). The facts in this case show that the Pierce/Geiger control is limited to structuring the corporation and soliciting voting principals who qualify for preferences. They do not seek to control broadcast operations directly nor through their wives who as non-voting shareholders would not involve themselves in operational broadcast decisions. The evidence establishes that Messrs. Pierce and Geiger found an opportunity to earn legal fees and to invest in a local TV venture with their wives. But that is where their interests cease according to the evidence. It is also noted that Pierce and Geiger did not affirmatively misrepresent themselves as limited partners or non-voting shareholders. And Pierce and Geiger have acted only as promoters and attorneys and those roles were not concealed. There is no basis for ascribing their roles, as active as they have been, to that of undisclosed principals who seek to own and operate a TV station in Perry. Nor has there been any misrepresentation to the Commission on the part of Perry TV, Mr. Pierce or Mr. Geiger since there has been no affirmative misrepresentation with respect to non-voting shareholders and Pierce and Geiger's roles were limited to that of controlling persons as promoters which were not roles that they concealed. Thus, the needed element of intent to deceive is unproven. *See Catoctin Broadcasting Corp. of New York, et al.*, 2 F.C.C. Rcd 2126, 2137-38 (Review Bd 1987) *aff'd* at Comm'n Slip Op. FCC 89-74, released March 24, 1989. Therefore, Perry TV remains qualified to receive a grant, albeit on a close call wherein no comparative credit can be awarded.

Common Ownership

90. There are two prongs to the issue: Whether a grant to Radio Perry would be consistent with §73.3555(b)(1)(2) and if not, whether a grant to Radio Perry would be in the public interest. The regulation provides that no license shall be awarded for a TV station to any party already having one or more AM, FM or TV station with predicted contours that would overlap. Such public interest is premised on the policy of encouraging the development of UHF television broadcasting when the operations of radio stations are needed to support the TV venture. Here it is established that Radio Perry's WPGA AM/FM stations do in fact broadcast in the community of license for UHF Channel 58 at Perry. The stated public interest exception to the prohibition is set forth under *Note 4* to the regulation. The exception is permitted where common ownership is needed to ensure the development of a new UHF television station. *See Wilton E. Hall*, 68 F.C.C. 2d 642 (1978) (profits generated by radio stations essential to vitality of new UHF television station). In *Wilton E. Hal, supra*, the commonly owned radio and television stations were operating at successive financial losses and it was necessary to sell and assign them as a unit in order to keep the TV broadcasting on-the-air. Since this case involves the award of a construction permit for a new UHF station those considerations are not relevant.

91. Another recognized test is whether the integration of local ownership would significantly contribute to the "diversity of service and competition in the market" by providing a first source of TV broadcast. *Hobart C. Johnson TV, Inc.*, 2 F.C.C. Rcd 194 (1987). But that standard does not apply exclusively to Radio Perry since there are two applicants here who can provide the first TV service

for Perry. Also, since Perry TV is a new factor in the Perry broadcast market it is more likely that Perry TV would provide greater diversity and more competition than Radio Perry.

92. Radio Perry acknowledges that Perry and the surrounding area can support a local television service if it is locally directed. But the TV station that Register planned for Perry:

> will be able to service from an economic standpoint only if it uses relatively modest technical facilities to carve out a local viewership, while relying on Radio Perry, Inc.'s existing personnel and physical plant to provide experience, expertise and efficiencies.

Radio Perry PFC at 74-75. But that argument is rejected as circular. Radio Perry elected only that plan which incorporates the facilities at the AM/FM station. It does not establish that there are no feasible alternative plans that would involve construction and operation without the use of Radio Perry's existing AM/FM facilities.

93. Finally, Radio Perry would qualify for a *Note 4* exception only if the joint operation was shown to be necessary for the viability of the new UHF station. *WML LPTC Co.*, 3 F.C.C. Rcd 1956 (1988). But Radio Perry's proof does not support such conclusion. The analysis of the cost data relied on by Radio Perry shows that it would cost approximately $31,000 per month to operate a stand alone TV station. It would cost approximately $21,500 to operate a TV station in combination with Radio Perry's AM/FM station. That would result in a savings to Radio Perry of approximately $10,500 per month. But that savings is not shown as essential for the viability of the TV station. *See Para.* 49, *supra*. It is only in cases where the support supplied by the radio station is "essential" to the development of the viability of the television station that an exception is warranted. *Best Broadcasting Co., Inc.*, 54 Radio Reg. 2d (P&F) 1471 (1983). The record does not contain substantial evidence that supports the conclusion that the Perry community is unlikely to sustain the operation of an independent UHF station or that the development of Channel 58 would be dependent on the savings from Radio Perry's proposed joint operation. *Compare WML LPTC Co., supra*, wherein such conclusions were made.

94. Radio Perry also advances an argument that the operational savings by joint ownership would provide stronger competition to meet the existing 19 broadcast outlets with signals that reach Perry. *See* Para. 48, *supra*. But that thesis is based on an assumption that key broadcast personnel who are not related to Register would assume TV duties without added compensation. That predicate was rejected because there was insufficient supporting evidence introduced. *See* Para. 49, *supra*. Also, whether or not Radio Perry would offer a stronger competitive focus is irrelevant. The policy of a *Note 4* exception is to facilitate a new TV outlet in a community; it is not a policy to advance the stronger competitor among two applicants seeking the license. Also, in that some connection, Radio Perry has not shown that Perry TV would be such a weak competitor without allied radio broadcast facilities and personnel that it would fail in a market of 19 competitors.

95. The Commission recently has expanded its policy under *Note 4* to look favorably on waiver where there are at least 30 separately owned and operated broadcast stations in any one of the top 25 markets. *In the Matter of Amendment of § 73. 3555 of the Commission's Broadcast Multiple Ownership Rules*, FCC 88-407, released December 12, 1988. But the Commission has not altered its policy in markets the size of Perry. The standard fostering diversity applies here in construing the public interest element under the *Note 4* exception:

> The 'public interest' standard necessarily invites reference to First Amendment principles [citation omitted] and, in particular, to the First Amendment goal of achieving the "widest possible dissemination of information from diverse and antagonistic sources."

Associated Press v. *United States*, 326 U.S. 1, 20 (1945).

96. Because of a failure on the part of Radio Perry to meet its burden of proof, there is not sufficient evidence to conclude that it would be in the public interest to grant on exception from the Commission's regulation barring common ownership in the same broadcast market.

COMPARATIVE CONCLUSIONS

Diversification

97. Maximum diffusion of control of the media of mass communications is a factor of primary significance. *See* Commission *Policy Statement*, 1 F.C.C. 2d 393, 394 (1965). Since Perry TV and its principals have no ownership interests in any media of mass communications, on a comparative basis, Perry TV is entitled to a substantial preference over Radio Perry which owns and operates AM and FM broadcast facilities in the city of license.

Integration

98. Perry TV is not entitled to any integration credit because of the attribution of the non-voting equity interests through the proven control of Pierce and Geiger, because Perry TV's integration was not set until September 1987, because Quentin Harvey abandoned his 31% involvement after the "B" cut-off, and because Hervia, Catherine and Denise Ingram and Alexander Dy were found to be unprepared to assume meaningful managerial roles. Alternatively, if the holding on control and attribution is not upheld on review, the adverse findings with respect to the voting shareholders proposed for integration would still result in no integration credit for Perry TV. However, if its integration proposal were counted, Perry TV would receive a 69% integration credit and a related minority preference.

99. Radio Perry has shown by a preponderance of the evidence that Lowell L. Register will be integrated on a full-time basis as the station's General Manager.[12] Register has considerable broadcast experience. In addition to that experience, there is the requisite assuredness established to conclude that the integration proposal of Radio Perry will be fulfilled. Therefore, Radio Perry receives a 100% integration credit.

Comparative Coverage

100. Consideration of comparative coverage data is within the discretion of the Presiding Judge. *Jaco, Inc.*, 18 F.C.C. 2d 677 (Review Bd 1969). Perry TV asserts that its coverage is superior. Therefore, Perry TV has the burden to show by a preponderance of the evidence that its proposed coverage is superior to Radio Perry's. That burden is met. Perry TV's signal will cover an additional 15,195 square kilometers and will reach 225,290 additional persons. Perry TV also provides a first service to a white area of 9,277 people, a second service to a gray area of 23,867 people, and third and fourth services respectively to 10,057 persons and 15,142 persons. Such superior coverage entitles Perry TV to a substantial coverage preference. *Compare Tucson Community Broadcasting, Inc.*, 2 F.C.C. Rcd 568, 569 (Review Bd 1987), recon. denied, 2 F.C.C. 2860 (1987) (white area 1,367 persons; gray area - 2,831 persons; third service for 4,493 persons: credited with moderate-to-substantial preference).

Contingent Comparative Summary

101. Of the two applicants, only Perry TV is found qualified because Radio Perry has failed to prove entitlement to an exception for its common ownership. But a contingent comparative analysis is made in the event that holding is reversed. Contingently, Perry TV receives a substantial coverage preference, a factor that outweighs Radio Perry's integration preference. *RAM Enterprises*, 57 F.C.C. 2d 844 (Review Bd 1976); *Washoe Shoshone Broadcasting, supra* at 3951. *See also Town and Country Radio, Inc.*, 70 F.C.C. 2d 572 (Review Bd 1978); *Communications Properties, Inc.*, 92 F.C.C. 2d 45 (Review Bd 1982); *Radio Jonesboro, Inc.*, 96 F.C.C. 2d 1106, 1113 (Review Bd 1984). Perry TV also receives a diversification credit for having no media interests and Radio Perry receives a diversification demerit for the WPGA AM/FM stations in Perry. Perry TV receives no integration credit and therefore its claims for minority preferences, local residence and related civic involvements become moot. Perry TV receives no credit for broadcast experience. Radio Perry is 100% integrated but seeks no minority or female preference. Radio Perry receives a substantial credit for Register's broadcast experience and another substantial credit for his local residence and civic involvement. Based on these assessments of merits and demerits, Perry TV would be the comparative selection based on its substantially superior coverage.

ORDER

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or unless the Commission reviews this Initial Decision on its own motion,[13] the application of Radio Perry, Inc. (File No. BPCT-870317KI) IS DENIED and the application of Perry Television, Inc. (File No. BPCT-870317KH) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] The application of Richard S. Ohendalski d/b/a/ RSO Broadcasting (File No. BPCT-861216IT) was dismissed for failure to prosecute. *See Order*, FCC 87M-2859, released November 13, 1987.

[2] Mr. Chase was called to testify to the circumstances surrounding the initiation of Perry TV's proposal since Mr. Chase was the venture's initiator. Counsel for Radio Perry had the burden of proceeding and noted Mr. Chase as a witness. Mr. Chase did not file an objection to his being called as a witness in accordance with the procedures established by the Presiding Judge. *See Order*, FCC 87M-2860, *supra*. When called to the witness stand, Mr. Chase made several objections for the record (including an argument that since he was called as a witness his travel and lodging should be paid for by Radio Perry) but those objections were overruled and Mr. Chase was called to testify. (Chase, Tr. 642-45.) It is noted that there was no assertion by Perry TV of the attorney-client privilege and Mr. Chase testified in an open manner on factual issues that he was privy to when he was promoting the Perry TV application. It is also noted that although not articulated, consideration was given by the Presiding Judge to Rule 3.7 of the Proposed Rules of Professional Conduct, D.C. Court of Appeals filed September 1, 1988 which addresses the ethical consideration where counsel representing parties are called to testify. *See Religious Broadcasting Network*, 3 F.C.C. Rcd 6216, 6217 (Review Bd 1988). Those concerns were resolved by the trial judge in this case in favor of permitting the testimony of counsel while permitting the same counsel to continue in their representations of Perry TV. Radio Perry called each of the attorneys as witnesses and offered no objection to their continuing as counsel. Certainly Radio Perry would be in the best position to recognize any prejudice to its interests. Also, there appeared to be no conflict between the testimony of Perry TV's shareholders and its attorneys. And since the counsel for Perry TV were so intimately involved in its formation and in its structure for integration, the development of a record required their testimony. Finally, by the time this case came to trial, Perry TV was so committed to the legal services of Chase, and Chase was so familiar with the evidence in the case, that it would have imposed an undue hardship to require that Perry TV proceed with new trial counsel.

[3] Pierce also was involved in related corporate matters. He initially advised Chase that the corporate applicant would be "Perry Investors, Inc." an inactive corporation wholly owned by James Geiger since 1985 (*see* RP Exh. 4, pp. 5, 7; RP Exh. 11; Chase, Tr. 671-72, Geiger, Tr. 1162-63). Perry Investors, Inc. had previously been used as an investment vehicle. (Geiger, Tr. 1160.) According to Chase, Geiger and Pierce suggested the name to Chase because it took so much time to incorporate a new company through the Georgia Secretary of State. (Chase Tr. 763-64; Geiger, Tr. 1163.) Chase testified that Pierce later advised him that Geiger had decided not to give the corporation to the new shareholders Pierce had recruited because doing so might give "an appearance of impropriety." (Chase, Tr. 748.) Pierce's records show that he reserved the name "Perry Television, Inc." with the Secretary of State on March 6, 1987, and filed the articles for that corporation on March 17, 1987, the day after he finished drafting them (Perry TV Exh. 15, pp. 2-3; Pierce, Tr. 1059-60).

[4] The evidence shows that Pierce and Geiger were aware of the unrebuttable presumption of active participation of investors who perform legal services. *See Clarification on Ownership Attribution*, 1 F.C.C. Rcd 802, 804 (Comm'n 1986). Chase, the communications counsel, was aware of it and he is presumed to have communicated the state of the law on attorney attribution

at the time that he contacted Geiger. It is found that Pierce was aware of the attribution rule applicable to him while he was drafting the articles of incorporation. *See* Perry TV PFC at 53.

[5] Chase testified that after Pierce spoke with Harvey, he (Harvey) had conversations with Chase in which Chase reviewed the plan for Perry TV and the steps needed to be taken. Chase also testified that Harvey said he wished Chase to serve as Washington counsel. (Chase, Tr. 667-68.) But Harvey was never produced as a witness to corroborate the Chase account which will be rejected as hearsay, the reliability of which could have been corroborated by a subpoena to Harvey.

[6] Perry TV claims that when Ms. Ingram joined, she and Harvey agreed to the 40/40 division. Then when the idea of having Ms. Ingram's parents join the group came up, Harvey dictated the allocation of stock to the Ingrams because he did not want the three Ingrams to have a controlling portion of the voting stock. (*See* Perry TV PFC at 42-43.) This hearsay is rejected for the same reason. Harvey should have been called as a witness to corroborate. As noted above, he was never called as a witness by Perry TV and no subpoena was sought. It is also noted that when Mr. Kravetz asked Ms. Ingram in crossexamination when she learned that Harvey was proposing to withdraw from Perry TV, Mr. Chase objected. (D. Ingram, Tr. 54.) Perry TV cannot seek favorable findings when it has blocked the relevant testimony. Harvey's deposition was taken by Radio Perry and excerpts were not received in evidence. (Tr. 2670.)

[7] Mr. Ingram testified at the hearing that he had spoken to Cabasares and Dy in only a general way. Therefore, the inconsistency with his deposition wherein he denied speaking with them at all is not a material variance on particular decisional facts that would require rejecting his testimony. *See Broadcast Associates of Colorado*, 104 F.C.C. 2d 16, 19 (Comm'n 1986) (disqualification unwarranted for inaccurate deposition testimony). However, the reliability of Mr. Ingram's testimony was substantially reduced and where there is a conflict it will not be relied on by the Presiding Judge.

[8] *See McCormick On Evidence* §272 (1984) (if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so raises a presumption that the testimony would be unfavorable) applied in *Port Huron Family Radio, et al.*, 4 F.C.C. Rcd 2532, 2535 (Review Bd 1989).

[9] There was an initial concern about the ethical considerations of counsel for Perry TV meeting with Register who was without counsel. But the facts establish that Mr. Kravetz knew that Mr. Register was going to meet with Pierce and Geiger and Register waived any objection. (Register, Tr. 2617-19.) Thus, there was no ethical violation on counsel's part in connection with those meetings.

[10] It was after the first meeting that Chase was contacted for advice and Chase provided the options, including by-outs, dismissals and merger. (Chase, Tr. 9333, 979-80.) After the first meeting, Pierce contacted Hervia Ingram and without raising the question of money settlement, asked whether Mr. Ingram was interested in a dismissal of Perry TV's application to which question Mr. Ingram answered no. (Pierce, Tr. 925, 927-28.) This is substantially corroborated by Mr. Ingram's testimony. (H. Ingram, Tr. 1986-87, 2009, 2013, 2041.) However, there were no affirmative instructions given by Mr. Ingram and he was only speaking for himself.

[11] The other stations are WTWC, Tallahasee, Florida; WOWL, Florence, Alabama; WJWT, Jackson, Tennessee; WIHT, Ann Arbor, Michigan; WMGT, Macon Georgia; WVGA, Valdosta, Georgia; and WDHN, Dothan, Alabama.

[12] Perry TV argues that if significance is to be attached to failures to timely prepare and execute documents, then Radio Perry's corporate actions since 1974 would be null and void since Janice Register was a director but no formal records were made on corporate actions that were taken. *See* Perry TV PFC at 113-114. By disallowing the corporate acts of Radio Perry since 1974, there would be an adverse impact on Radio Perry's integration proposal. However, it would be non-productive to deny the reality established by the totality of the evidence which shows that Mr. Register controls Radio Perry, and it would be unproductive and wasteful to give close legal analysis to Perry TV's thesis because it lacks decisional significance for this case.

[13] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-252

In re Applications of

JOHN JAY ISELIN File No. BPH-870430NH

CARMINE A. PIZZA, GENERAL PARTNER CATSKILL FM, LTD., A LIMITED PARTNERSHIP File No. BPH-870430NI

For Construction Permit for a New FM Station, Channel 253A, in Catskill, New York

Appearances

Steven A. Lerman, Esquire, Laura B. Humphries, Esquire, and *Dennis P. Corbett, Esquire,* on behalf of John Jay Iselin; *James J. Freeman, Esquire,* and *Joel E. Laiks, Esquire* on behalf of Carmine A. Pizza, General Partner, Catskill FM, Ltd., A Limited Partnership; and *Robert Zauner, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: May 23, 1989; Released: June 2, 1989

PRELIMINARY STATEMENT

1. By *Hearing Designation Order,* DA 88-731, released May 25, 1988, the Chief, Audio Services Division, designated for hearing three applications, each of which sought a construction permit for a new station on Channel 253A to serve Catskill, New York. The Designation Order specified the following issues:

> If a final environmental impact statement is issued with respect to CFL in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R., §§ 1.1301-1319.[1]
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. By *Order,* FCC 88M-2363, released July 22, 1988, the Presiding Judge dismissed, with prejudice, the application of Malcolm Kahn, *et al.,* d/b/a Catskill Broadcasting Company, A General Partnership, for failure to prosecute pursuant to Section 1.221(c) of the Commission's rules. Thus, only the applications of John Jay Iselin (Iselin) and Carmine A. Pizza, General Partner, Catskill FM, Ltd., A Limited Partnership (CFL) remain.

3. A prehearing conference was convened on July 28, 1988. A hearing session was held on January 10, 1989. The Presiding Judge closed the record at the conclusion of the January 10, 1989, hearing session (Tr. 155).

4. Proposed Findings of Fact and Conclusions of Law were filed by Iselin and CFL on March 10, 1989. Reply Findings were filed by both applicants on March 24, 1989.

FINDINGS OF FACT

JOHN JAY ISELIN

5. John Jay Iselin (Iselin) is a sole proprietor (100 percent owner). (Iselin Ex. 1, p. 1.)

Diversification

6. Iselin serves as a member of the board of trustees of the National Geographic Society. In the event of a grant of his application, Iselin will resign that position. Iselin has no interests in other media of mass communications. (Iselin Ex. 1, p. 4.)

Integration

7. Iselin will work part-time, 20 hours per week, as general manager of his proposed station. Iselin will have oversight and supervisory responsibility for all aspects of station operation, including but not limited to programming, sales and personnel. Iselin will hire a station manager who will handle day-to-day oversight details when Iselin is not at the station, and who will report directly to him on a regular on-going basis. (Iselin Ex. 1, p 1.)

8. Since July 1, 1988, Iselin has been the president and chief executive officer of The Cooper Union for the Advancement of Science and Art in New York City. (Tr. 50; Iselin Ex. 1, p. 1.) In the event his application is granted, Iselin will not resign his position at Cooper Union. (Iselin Ex. 1, pp. 1-2.) Cooper Union has a student body of 1,000 and includes three professional schools: engineering, art, and architecture. (Tr. 50.) As president and CEO, Iselin is responsible for supervising the academic student life at the institution through an executive vice-president, overseeing the administrative and financial aspects of the institution through a vice-president for administrative and financial affairs, and attending to the revenue needs of the institution by supervising an office which deals with alumni and other constituencies in the metropolitan area. (Tr. 51.) Iselin's position requires him to work "in the order of 45 odd hours" per week. (Tr. 54; Iselin Ex. 1, p.2.) His typical work day begins at approximately 9:00 a.m. and concludes around 5:30 or 6:00 p.m. (Tr. 52.) The position also entails attendance at social functions and occasionally will require him to travel and to attend professional meetings outside the New York City area.[2] (Tr. 52.) During summer vacation periods, Iselin's duties will require approximately 35 to 40 hours per week. (Iselin Ex. 1, p. 2.) Iselin is entitled to 4.4 weeks vacation

from Cooper Union, and the school is closed two additional weeks during the academic year when Iselin has no time commitment to Cooper Union. (Tr. 62; Iselin Ex. 1, p. 2.)

9. Iselin maintains two residences. His primary residence is at 153 West 12th Street, New York, New York 10011. He has lived in New York City since 1965. He presently lives in New York City with his wife, who is an attorney, and nineteen year old daughter. (Tr. 41.) His weekend and vacation residence is Schnackenberg Road, Ghent, New York 12075. (Iselin Ex. 1, p. 1.) Since 1985, Iselin has resided during weekends and most vacation periods (approximately four weeks per year) at his residence in Ghent, New York, which is within the predicted service area of his proposed station. Occasionally, a weekend at the Ghent, New York, residence is missed. (Tr. 43.) In the event of a grant of his application, Iselin will continue to reside in Ghent, New York, on the basis set out above. (Iselin Ex. 1, p. 3.) Iselin ultimately intends to make his Ghent, New York, residence his long-term permanent residence. (Tr. 46, 48.) Catskill is approximately 120 miles from New York City. (Iselin Ex. 1, p. 1.)

10. To fulfill his integration proposal of a "minimum of 20 hours per week," Iselin proposes to work on station business and be available from his New York residence to speak with the station manager by telephone for ten hours during the week. (Tr. 92-93, 94; Iselin Ex. 1, p. 2.) His plan "would be to set aside an hour in the morning, let's say 7:30 to 8:30 and again in the evening, let's say between 6:30 and 7:30 to check on the progress of the day." (Tr. 93.) While Iselin would be available at his residence to speak with the station manager, he does not necessarily intend to have the station manager spend two hours per day on the telephone with him. (Tr. 94.) Iselin would "expect the station manager to report on the faithful and, [he] would hope, effective execution of a programmatic approach" (Tr. 86), and "would hope to be able to be very conversant with the progress of the station . . " (Tr. 93.)

11. Iselin will leave his New York office on Friday, commute 120 miles to Catskill, and spend the evening in Ghent. (Tr. 93; Iselin Ex. 1, 1.) On typical Saturdays, Iselin anticipates spending a full work day (eight hours) at the station "meeting the staff, having a personal presence there, and, if necessary, in the community." (Tr. 93; Iselin Ex. 1, p. 2.) He does not, however, have any specific idea of the things he would be doing on a typical Saturday. (Tr. 94.) On Sundays, he anticipates putting in "a modest amount of work time," approximately four hours, depending on how the home situation stands. (Tr. 93; Iselin Ex. 1, p. 2.) His duties on Sunday "might be in the community, but they will be work-related," [3] and it is possible Iselin "might set up a series of plans of review, of consultation." (Tr. 94.) Essentially, on Sunday, Iselin would "just set[] aside enough time to be able to anticipate a physical presence in the area," and he intends to reserve part of Sunday for non-station activities. (Tr. 94.)

12. During summer vacation periods at Cooper Union, Iselin, as previously noted, anticipates that his duties will require him to work approximately thirty-five to forty hours per week, and he intends to devote an additional five to ten hours per week to station work during that time. (Iselin Ex. 1, p. 2.) During three of the six weeks that the school is either closed or Iselin is on vacation and has no time commitment to Cooper Union, he will work a minimum of forty hours per week at the station. (Iselin Ex. 1, p. 2.) The remaining three weeks will remain vacation time.

13. Iselin contemplates hiring approximately a dozen people to work at the station, one of which will be a station manager. (Tr. 83-84, 87; Iselin Ex. 1, p. 1.) According to Iselin, the station manager's duties and responsibilities would include the following:

> The station manager would perform the day-to-day functions of administering the policies that I would attempt to set for the station, to supervise the operations and to report to me in terms of any difficulties or progress that is being made. Keep me well informed of what was going on. To be the hands-on operator at the station itself.

(Tr. 84.)

In addition to the above, the station manager would have "a substantial responsibility in assisting the sales operation," and "would have substantial responsibility for the content and the nature of the programming," altnough there probably would be a sales manager and program manager who would report to the station manager. (Tr. 85.) Furthermore, the station manager would "have the ability to make decisions," and would be in charge of the bookkeeping aspects of the station, although a part-time bookkeeper would be retained to assist in this regard. (Tr. 86.) Finally, the station manager would be the station's representative in local organizations such as the chamber of commerce and rotary club. (Tr. 96-97.)

14. From 1971 to 1973, Iselin served as general manager of noncommercial educational television broadcast station WNET, Channel 13, Newark, New Jersey. From 1973 through May 1987, Iselin served as a member of the board of trustees of the Educational Broadcasting Corporation (EBC), the WNET licensee. During that period, he also served as president and chief executive officer of EBC with primary responsibility for the day-to-day operation of the station. From June 1987 through June 1988, Iselin served on a part-time basis as a consultant to EBC. (Iselin Ex. 1, pp. 2-3.)

15. Since 1986, Iselin has served on the Development Committee of the Board of Directors of the Columbia County Historical Society and devotes about two hours per month to this activity. He is also a member of the society. His duties include soliciting new membership and fundraising, and he carries out these duties principally on weekends through social contacts and telephone calls. (Tr. 70-72.) Since 1987, Iselin has assisted the Hawthorne Valley School, a private elementary and secondary school in Ghent with fundraising for school operations and to rebuild a building after it was destroyed by fire. Since 1986, Iselin has assisted the American Farm Land Trust and the Columbia County Land Trust in promoting the preservation of the agricultural character of the Columbia County area. Since 1986, Iselin has participated in the fundraising efforts of the Catholic Youth Charities in Greene/Columbia counties. Iselin has participated in informal discussions with the Greene County Administrator and others on methods of publicizing cultural attributes of the county in order to promote economic develop-

ment. (Iselin Ex. 1, pp. 3-4.) A great deal of Iselin's so-called civic involvement occurs at social functions. (Tr. 72-79.)

Auxiliary Power

16. In the event of a grant of his application, Iselin will install auxiliary power generators at the station and at the transmitter site. (Iselin Ex. 1, p. 4.)

CATSKILL FM, LTD.

17. Catskill FM, Ltd. (CFL) is a limited partnership formed under the laws of the State of California. (CFL Ex. 1, p. 1; CFL Ex. 2, p. 1.) It consists of two partners. Carmine A. Pizza is the sole general partner and owns 20 percent of the equity in the partnership. (Tr. 111; CFL Ex. 1, p. 1.) The sole limited partner is Catskill Communications, Inc. (CCI), which owns 80 percent of the equity in the partnership. (Tr. 111-112; CFL Ex. 1, p. 1.) CCI is licensee of AM broadcast station WCKL, Catskill, New York. CCI does not have any businesses other than WCKL. (Tr. 121-122, 123; CFL Ex. 1, p. 2.)

18. The officers, directors, and shareholders of CCI are as follows:

Nick Vanoff	57 percent	President	Director
Alan Courtney	15 percent	Treasurer	Director
Carmine Pizza	10 percent	Exec. Vice President	Director
Frank Peppiat	9 percent		
John Aylesworth	9 percent		
Arnold Sundel		Secretary	Director

(Tr. 112-113; CFL Ex. 1, p. 1.)

The shareholders, officers, and directors of CCI have remained the same since CCI acquired WCKL in 1977. (Tr. 149.)

19. The CCI Bylaws specify the following: (1) The shareholders shall meet annually on the fifth of January or the next business day thereafter for the purpose of electing a board of directors and transacting other business. (Iselin Ex. 3, p. 1.) (2) The board of directors shall meet annually immediately following the annual meeting of shareholders. (Iselin Ex. 3, p. 5.) (3) The business of the corporation shall be managed by its board of directors. (Iselin Ex. 3, p. 3.) (4) The board of directors shall act by vote of a majority of the directors. (Iselin Ex. 3, p. 4.) (5) The president shall be the chief executive officer of the corporation, shall have the management of the business of the corporation, and shall see that all orders and resolutions of the board of directors are carried into effect. (Iselin Ex. 3, p. 6.)

20. Since 1977, the shareholders of CCI have not met to transact CCI business. (Tr. 119.) The officers and directors of CCI have not met face-to-face or by telephone to transact CCI business. (Tr. 119-120.) There are no records of any shareholders', directors', or officers' meetings. (Tr. 143.) Since 1977, Pizza has discussed CCI affairs with Vanoff approximately once a year on average. (Tr. 120.) With the exception of conversations relating to a consultant that Vanoff once hired in connection with WCKL, those conversations have been limited to financial matters. (Tr. 120.) Since 1977, Pizza has spoken with Sundel about CCI matters approximately twice a year on average, and those conversations have been limited to matters relating to a possible station sale and finances. (Tr. 120-121.) From 1977 until January 9, 1989, Pizza spoke to Courtney -- a 15 percent shareholder, treasurer, and director of CCI -- only one time. (Tr. 121.) Pizza controls the operation of the business of CCI on a day-to-day basis. (Tr. 123.) The stockholders, officers or directors of CCI have not given Pizza advice on how to run the business of CCI. (Tr. 124.) The shareholders of CCI other than Pizza do not play any role in connection with WCKL other than to provide funds for the station. (Tr. 145.) Pizza reports annually through a financial statement to the other shareholders of CCI. (Tr. 123, 145.) Pizza transmits a six-month profit and loss statement to the other shareholders of CCI. (Tr. 145.)

21. The CFL Limited Partnership Agreement specifies: "Upon activation of the FM Station, the General Partner shall devote his full time and best efforts to the conduct of the Partnership business." (CFL Ex. 2, 4.) The CFL Limited Partnership Agreement specifies: "The Limited Partners shall not take part in the management of the business or transact any business for the Partnership . . . No Limited Partner shall provide services to or be employed in any capacity by the Station . . . . The Limited Partners shall not communicate with the General Partner on the day to day operations of the [S]tation." (CFL Ex. 2, p. 6.) There is no written agreement among the principals of CFL which excepts Pizza from the limitations on actions of limited partners established in the CFL Limited Partnership Agreement. (Tr. 140.) In the event of a grant of CFL's application, Pizza will continue to serve as an officer, director and shareholder of CCI. (CFL Ex. 1, p.2.)

22. Gary Edelstone (Edelstone), who is counsel for Vanoff, recommended FCC counsel to be used in prosecuting CFL's application. (Tr. 128.)[4] It was FCC counsel's recommendation that a limited partnership, rather than CCI, should apply for the Catskill FM station. (Tr. 148.) FCC counsel drafted the CFL Limited Partnership Agreement, and it was FCC counsel's idea that Pizza become general partner of CFL. (Tr. 129-130.) Pizza never discussed directly with Vanoff whether Pizza or Vanoff should be the general partner of CFL. Pizza did not meet with any of the other CCI shareholders, directors, or officers to discuss CFL's formation, and no meeting of CFL principals has ever been held. (Tr. 130.) Pizza briefly discussed the Limited Partnership Agreement with Edelstone, whom Pizza believed to be acting as counsel for Vanoff, as well as FCC counsel. (Tr. 144.) Pizza has no personal knowledge of whether any of the other CCI shareholders, directors or officers (other than Vanoff through Edelstone) had any input into the CFL Limited Partnership Agreement. (Tr. 130.) FCC counsel proposed the division of equity in CFL between the general partner (20 percent) and the limited partner (80 percent). Pizza did not negotiate the percentage for the general partner. Pizza did not have a lawyer review the Limited Partnership Agreement on his behalf before he signed it. (Tr. 131.) Pizza signed the CFL Limited Partnership Agreement on April 28, 1987. Vanoff signed the CFL Limited Partnership Agreement some time after April 30, 1987. (Tr. 135.)

23. Edelstone secured the initial financial commitment letter concerning CFL's application from Vanoff, and Pizza did not participate in any manner in obtaining such commitment. (Tr. 131.) The initial financial commitment letter from Vanoff was addressed to Pizza as vice-president of CCI and not as general partner of CFL. (Tr. 132; Iselin Ex. 5, p. 1.) Edelstone also secured a substitute financial

commitment letter from the Bank of California. (Tr. 133; Iselin Ex. 6, p. 1.) Pizza did not participate in securing this substitute letter. (Tr. 133.) The substitute financial commitment letter ultimately issued by the Bank of California is in favor of CCI and not CFL. (Tr. 134.)

24. Edelstone filed the CFL Certificate of Limited Partnership with the State of California on May 18, 1987. (Tr. 135-136; Iselin Ex. 7, p. 1.) By letter dated May 20, 1987, Edelstone advised Pizza to establish a bank account for CFL separate from that for CCI, and requested Pizza to provide him with the amount outstanding on FCC counsel's bill prior to payment. (Tr. 136; Iselin Ex. 8, p. 1.)

25. CFL's bank account was not opened until October 24, 1988, approximately one and one-half years after the CFL application was filed. As of November 28, 1988, CFL had not reimbursed CCI for any FM expenses paid out of CCI funds. (Tr. 138.)

Diversification

26. CFL has no interest in or connection with any medium of mass communication other than the instant application. (CFL Ex. 1, p. 2.) The limited partner, CCI, has no such interest except for its AM station, WCKL. (*Id.*) In the event of a grant of CFL's application, CCI will dispose of its interest in WCKL. (*Id.*) Except for Mr. Pizza's interest in and employment with WCKL, he has no interest in or connection with any other medium of mass communications. (CFL Ex. 3, p. 5.) The principals of the limited partner have no interest in or connection with any medium of mass communications other than WCKL. (CFL Ex. 1, p. 2.)

Integration

27. As the sole general partner, Mr. Pizza will have and intends to exercise full control over the management of the partnership. (CFL Ex. p 1, 2; CFL Ex. 2, p. 5.) Neither the corporate limited partner, CCI, nor any officer, director or shareholder of CCI, other than Mr. Pizza, will be actively involved in the management or operation of the partnership or the proposed station.[5] (CFL Ex. 1, p. 1; CFL Ex. 2, p. 6.) CCI has no right to vote on any matters involving the day-to-day operations of the partnership (CFL Ex. 1, 1), and neither CCI nor any of its principals other than Mr. Pizza will provide services to or be employed by the station, serve as an independent contractor or agent for the station, or communicate with the general partner about the day-to-day operations of the station.[6] (CFL Ex. 1, pp. 1-2; CFL Ex. 2, p. 6.)

28. Mr. Pizza will be the full time general manager of the Catskill FM station, and will devote in excess of 40 hours per week to the management of the station. (CFL Ex. 3, p. 1.) He will have no other employment or active business involvement other than the management of the proposed station. (CFL Ex. 3, pp. 1-2.) As general manager, he will establish station policies and assure compliance with them. (*Id.*, p. 2.) These policies cover all major facets of station operation including, but not limited to, programming, contests, EEO, community service and business policies. (*Id.*) Mr. Pizza will also be responsible for financing, budgeting, supervision of billing and collections and other similar matters. (*Id.*) Finally, Mr. Pizza will represent the station to the community by keeping in touch with community leaders. (*Id.*)

29. Mr. Pizza currently resides in the Town of Greensport, New York, which is adjacent to Catskill, and he has lived there since 1969. (CFL Ex. 3, p. 2.) This residence is within the 70 dBu contour of the proposed station. (*Id.*, p. 3.) Prior to this residence, Mr. Pizza lived at 16 Cowles Street in the Village of Catskill for approximately three years. (*Id.*) For a few months, Mr. Pizza lived in the Village of Saugerties which is within the service area of the proposed station. (*Id.*) While a youth, Mr. Pizza resided at his family home located at 532 Warren Street in Hudson, which also is within the service area of the proposed station, about four miles northeast of Catskill. (*Id.*)

30. Since 1983, Mr. Pizza has been a member of the board of trustees of the Green County Historical Society. (CFL Ex. 3, p. 3.) He also serves as an advisory member of the Greene County Chapter of the American Heart Association and in the past has served in a similar capacity for the Green County Chapter of the American Cancer Society. (*Id.*) He currently is also a member of Rotary International. (*Id.*) From 1970 to 1974, Mr. Pizza served on the board of directors of Catskill Boys' Club in Catskill, New York. (Tr. 108.)

31. Mr. Pizza has been named by the county legislature to the following advisory boards: (1) the Greene County Emergency Planning Board (member 1988 - currently) (CFL Ex. 3, p. 3.); (2) the Greene County Tourism Advisory Committee (member 1979 - 1982) (*Id.*); and (3) the Greene County Casino Gambling Steering Committee (member 1980) (CFL Ex. 3, p. 4). In addition, he was named by the legislature to a panel to study the problems at the Greene County Memorial Hospital, but the state intervened before the panel could begin its work. (*Id.*) Mr. Pizza also was twice named by the legislature to a search committee to locate a new promotion director for Greene County. (*Id.*)

32. Mr. Pizza has served for the past two years as an advisor to Columbia-Greene County Community College on the development of the electronics curriculum. (CFL Ex. 3, p. 4.) He also was an advisor to the Catskill School Board in its last search for a superintendent in 1987 and hosted several public meetings for the candidates. (*Id.*) Mr. Pizza also has worked with local school boards where there were contested elections to arrange "meet the candidate" functions and hosted some of these affairs. (*Id.*) Mr. Pizza is currently involved with a group called Community Action which is seeking to replenish local food banks before the 1989 holiday season. (*Id.*) Some weeks Mr. Pizza spends two or three hours on civic activities and other weeks he might spend up to eight hours. (CFL Ex. 3, pp. 4-5.)

33. Mr. Pizza has served as general manager of Station WCKL since it went on-the-air in 1970. (CFL Ex. 3, p. 5.) From 1964-1969, Mr. Pizza worked weekends as an announcer at WBAZ, in Kingston, New York. (*Id.*) Prior to that time, from 1961-1964, Mr. Pizza worked part-time, during the school year, and full time during the summer, as an announcer at WHUC in Hudson, New York. (*Id.*)

Auxiliary Power

34. CFL will have a complete auxiliary power system so that its transmission facility and studio can continue to function in case of an emergency. (CFL Ex. 3, p. 6.)

ULTIMATE FINDINGS AND CONCLUSIONS

35. This proceeding presently involves the mutually exclusive applications of John Jay Iselin and Carmine A. Pizza, General Partner, Catskill FM, Ltd., a Limited Partnership. Resolution of this case is governed by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). In the *Policy Statement*, the Commission established two primary objectives toward which the comparison should be directed: (1) a maximum diffusion of control of the media of mass communications; and (2) the best practicable service to the public. In determining which applicant will provide the best practicable service to the public, the Commission stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners, including such matters as broadcast experience, local residence and past participation in civic affairs. (*Id.*, p. 395.) The Commission considers participation in station operation by owners to be a factor of substantial importance because "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." (*Id.*)

Diversification

36. Under this criterion, neither applicant nor its principals have any attributable media interest, and the applicants are equal in this aspect of the comparative issue.

Integration

37. Because neither applicant has an advantage under the diversification criterion, the decision in this case must turn on the integration aspect of the comparative issue. Each applicant is in disagreement as to the amount of integration credit to which the other is entitled. Iselin, who works full time as the president of Cooper Union, claims credit for "100 percent part-time integration" because of the proposal of Mr. Iselin to be general manager and to devote "an average of 22 hours per week during the Cooper Union academic year; 27 to 32 hours per week (an average of 29.5 hours) during the 12 week Cooper Union summer vacation period; and at least 40 hours per week during three weeks of his six-week vacation time." On this basis, Iselin computes his integration credit, under the "Hirschman-Herfindahl Index,"[7] as follows:

Number of Hours Worked	Number of Weeks/Year	Hirschman-Herfindahl Calculations
22 (ave.)	37 (71.15%)	$(100 \times (22/40))^2 \times 1.00 \times .7115 = 2,152$
29.5 (ave.)	12 (23.08%)	$(100 \times (29.5/40))^2 \times 1.00 \times .2308 = 1,255$
40	3 (05.77%)	$(100 \times (40/40))^2 \times 1.00 \times .0577 = 577$
	52 (100.00%)	3,984

38. CFL argues that the integration credit claimed by Iselin in its findings varies from its integration and diversification statement; that Iselin's claim constitutes an impermissible comparative upgrade; that Iselin, at most, can only receive credit for a 20 hour per week part-time proposal and is not entitled to credit for the extra hours he proposes to work during the Cooper Union vacation schedule; that, at most, Iselin should receive a score of only 2,500 under the "Hirschman-Herfindahl Index" as follows:

$$(100 \times 20/40))^2 \times 1.00 = 2,500$$

Finally, CFL argues that Iselin should receive no integration credit because he has not shown that it is reasonably likely, because of his duties and responsibilities as president of Cooper Union, that his 20 hour per week part-time proposal will be effectuated.

39. At the outset, it is noted that in an integration and diversification statement filed by Iselin in this proceeding, it was stated that Iselin "proposes to work, part-time, a minimum of 20 hours per week as the general manager of the Catskill FM station." In a footnote, after noting that Iselin would soon become president of Cooper Union, Iselin further stated that he "will work no fewer than 20 hours each week at the FM station . . . and that he proposes to devote more than 20 hours per week . . . to the FM station during vacation periods at Cooper Union." Furthermore, in his direct case exhibit, Iselin again stated that he would "devote a minimum of 20 hours per week to the station." (Iselin Ex. 1.) To grant Iselin integration credit beyond 20 hours per week, in the face of these earlier statements, would constitute an impermissible upgrade which cannot be credited. *Barton Broadcasting Company*, 104 FCC 2d 785, 788 (1986). Iselin is entitled to credit for the minimum, not the maximum, amount of time he has proposed, which in this case is "a minimum of 20 hours per week." *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1495 n. 11 (1979); quoted in *Northern Sun Corporation*, 100 FCC 2d 1440, 1442 (1985).

40. Iselin's claim for increased integration credit for the additional time he intends to devote to the station (40 hours per week) during the time he is on vacation (three weeks) from Cooper Union, and the additional time during the summer vacation period when his duties to Cooper Union will be curtailed, is rejected. Clearly, such claim is at variance with the integration credit Iselin proposed in his integration statement, to wit, "a minimum of 20 hours per week," which, under *Midwest Broadcasting Company*, cited *supra*, is worthy of no more than 20 hours integration credit. The attempt to stretch the credit by taking into account the extra time Iselin will devote to the station when he has no commitment, or a reduced commitment to his full time job, is not supported by any Commission precedent. Indeed, the Commission awards integration credit on the basis of a proposal to be adhered to on a continuing regular basis, not on the basis of short, sporatic bursts of increased station involvement. *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 429 (1983). Thus, at most, Iselin can be credited with 20 hours per week of integration credit, which computes to 2,500 points under the "Hirschman-Herfindahl Index."

41. However, the Presiding Judge is not persuaded by Iselin's testimony that he has demonstrated the reasonable likelihood that he will effectuate his proposal to work a minimum of 20 hours per week as general manager of the proposed station. Such proposal consists of one hour each morning and evening during the work week from New York City; eight hours on Saturday at the station; and approximately four hours on Sunday. But, Iselin has not articulated with sufficient specificity exactly what he will be doing to merit integration credit. Merely being available to talk to the station manager who Iselin will install

to manage the station on a day-to-day basis, provides no assurance that Iselin will devote such time to station affairs. He certainly has not specified with any degree of detail what station affairs he will deal with either during the week from his New York City location or on Saturday or Sunday. This is important because, when the duties and responsibilities of the station manager are considered (*see*, paragraph 13 of the Findings), there is little left for Iselin to do. It appears that Iselin will act as a typical absentee owner, who hires a manager to run the station on a day-to-day basis. Iselin will be available to deal with problems that require an owner's decision, will be available to set overall station policy and for consultation purposes, but the actual management of the station and day-to-day operations will rest in the hands of the station manager. This type of a role is not one which merits integration credit. It is therefore concluded that Iselin will be an absentee owner who will not meaningfully and actively participate in the day-to-day operation of the proposed station and who will, at best, devote less than 20 hours per week to station affairs.[8] Because 20 hours per week is the minimum, below which integration credit may not be awarded for a part-time integration proposal,[9] Iselin will not receive any integration credit.[10]

42. CFL seeks 100 percent integration credit for integrating its general partner, Carmine A. Pizza, as general manager of the proposed station. Pizza, the sole general partner, has a 20 percent equity interest in CFL. He also has a 10 percent equity interest, and is a director and officer, in Catskill Communications, Inc. (CCI), the corporate limited partner and 80 percent equity owner. CCI is presently the licensee of WCKL, and Pizza has been the general manager of WCKL since 1970.[11]

43. Iselin argues that CFL is not entitled to any integration credit because no formal corporate meeting of CCI has ever been held, and representations as to how CCI has been controlled in the past are unreliable; that Pizza has been in complete control of the operation of WCKL despite the CCI corporate documents which indicate that Vanoff is the individual with day-to-day control because of his stock holdings and corporate office[12]; that CFL was artificially structured, and its partnership agreement was signed by Vanoff after the CFL application was filed[13]; that the corporate limited partner is not insulated from involvement in the applicant's day-to-day affairs; that no *bona fide* structure of CFL apart from CCI exists; that the financial commitment letters were addressed to CCI, not CFL; that CFL is a paper structure that has no meaningful life of its own; that Vanoff is not a "passive" investor because he has engaged in significant CFL activities through his personal counsel; that Pizza's claim that he will have sole control of the partnership is not credible. In the alternative, Iselin argues that if CFL is awarded any integration under the "Hirschman-Herfindahl Index," at most, it should be awarded 2,800 points for Pizza's full time integration (20 percent interest as general partner and 8 percent limited partnership interest, computed as follows:

$$(100 \times 40/40))^2 \times .28 = 2{,}800$$

44. Notwithstanding the arguments advanced by Iselin, it appears that CFL is a legitimate business arrangement and is entitled to 100 percent integration credit. The CFL limited partnership takes advantage of the broadcast experience and expertise of Pizza as the sole general partner who will be in full control of the operation of the partnership business. The other principals of CFL have not been materially involved and will not be involved in the operation of the station. They are clearly passive investors, and the best evidence of this is the manner in which WCKL has been operated. Pizza has been the sole individual in charge of the operation of WCKL. The other stockholders of CCI, while being kept advised by Pizza by periodic financial reports, have not participated in any fashion in the operation of the station. Pizza's activities with respect to the management of WCKL have been so overwhelming, that Iselin makes the argument that perhaps an unauthorized transfer of control has occurred.[14] The lack of involvement of the principals of CCI[15] in the operation of WCKL is persuasive evidence that they will also be truly passive investors in the proposed station.[16] Other than obtaining financial commitments, the other shareholders of CCI have not been shown to have been involved in the preparation of the application, the planning for the proposed station, or the prosecution of the application. Whatever was done by the principals of CCI appears to have been appropriate activities by a limited partner.

45. CFL is not to be denied integration credit for a general partner who also owns a limited partnership interest, as argued by Iselin. *Cotton Broadcasting Company*, FCC 89-46, *slip opinion*, released February 23, 1989. The Commission has recognized that it would be inconsistent with the Commission's attribution and integration policies to deny credit for the integration of a general partner because that partner also owns a limited partnership interest. *Newton Television Limited*, 4 FCC Rcd 2561 (1989). Thus, the mere fact that Pizza holds an interest in the corporate limited partner, does not prevent him from receiving integration credit for being the sole general partner in the applicant who will be the full time general manager of the proposed station.

46. The remaining arguments of Iselin, either individually or collectively, do not persuade the Presiding Judge that CFL is a sham not entitled to integration credit.[17] Indeed, after suggesting that Pizza has exercised so much control over CCI and WCKL to approach an unauthorized transfer, Iselin inconsistently argues that Pizza will not be in full control, and that Vanoff is not a "passive" investor. Aside from having his personal counsel recommend a communications counsel, and arranging for financing, neither Vanoff nor any other CCI principal (except Mr. Pizza) has had any material involvement in the preparation or prosecution of the CFL application, nor will they. These early activities on the part of a passive investor are not improper. *Cuban - American Limited*, 2 FCC Rcd 3264, 3270 (1987). They certainly do not indicate that the station will be secretly managed by the limited partners. *Victory Media, Inc.*, cited *supra*. This is particularly the case when Pizza's management role of WCKL is considered.

47. Even if Pizza only received integration credit for his equity ownership in the applicant (20 percent as a a general partner and an additional 8 percent as a principal in the limited partner, or a total of 28 percent equity interest), his integration credit under the "Hirschman-Herfindahl Index" would be greater than Iselin, even if Iselin's 20 hours per week proposal was credited. Specifically, CFL would receive 2,800[18] points, whereas Iselin would only receive 2,500[19] points. Moreover, Pizza has qualitative enhancement advantages over Iselin in the area

of local residence and civic involvement. Pizza has been a full time resident of the proposed service area for approximately 20 years compared to Iselin's limited part-time residence within the service area since 1985. Also, Pizza's civic involvement is much more extensive and meaningful than that of Iselin. Finally, both applicants have past broadcast experience, but because Pizza's experience has been in radio in the community to be served, his experience is slightly preferred.

48. In summary, the CFL structure is not a sham, but rather a legitimate business arrangement entitled to 100 percent integration credit. But, even assuming that CFL is only entitled to full time integration credit for the equity ownership of Pizza (28 percent), the CFL proposal is, nevertheless, superior to the Iselin proposal even if Iselin is awarded 20 hours per week part-time integration credit. Thus, CFL will provide the best practicable service, and a grant of its application will best serve the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[20] the application of Carmine A. Pizza, General Partner, Catskill FM, Ltd., A Limited Partnership (File No. BPH-870430NI) for a construction permit for a new FM station, Channel 253A, in Catskill, New York, IS GRANTED, and the competing application of John Jay Iselin (File No. BPH-870430NH) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] This issue has been conditionally resolved in CFL's favor. *See, Order*, FCC 88M-3281, released October 4, 1988. In that *Order*, the Presiding Judge stated that the Chief, Audio Services Division, by letter dated September 14, 1988, had found that CFL's application would have no adverse environmental impact if any construction permit was conditioned to require the erection of a fence at the base of the tower. CFL's September 6, 1988, amendment, which the Presiding Judge accepted, stated that CFL would erect such a fence to eliminate any problem.

[2] When Iselin was discussing his position at Cooper Union with the board of trustees, he informed the board that he had applied for the Catskill FM station but never identified any specific number of hours he might be working at the station. (Tr. 63-64.) Iselin did indicate to the chairman and vice-chairman of the board, however, that he would devote his time primarily to his position at Cooper Union. (Tr. 64.) In addition, Iselin represented to the board that "I should be anticipating devoting my full-time efforts as best I can to serving this institution, at least for the next several years subject to the board's approval." (Tr. 69.)

[3] Based on Iselin's description of his local activities, his work in the community may take place at social gatherings.

[4] Pizza was uncertain as to whether Edelstone first contacted FCC counsel on CFL's behalf or whether he (Pizza) made the first contact with FCC counsel on the basis of Edelstone's recommendation.

[5] Mr. Pizza has been the general manager of station WCKL-AM since its inception in 1970. (Tr. 141; CFL Ex. 3, p. 5.) The original licensee of WCKL was Caranje Broadcasting. (Tr. 141.) Mr. Pizza was vice-president, a 25 percent stockholder of Caranje, and general manager of WCKL. (*Id.*) In 1976, WCKL was sold to a group which later became incorporated as CCI. (Tr. 141-142; CFL Ex. 3, p. 5.) At the behest of the group, Mr. Pizza stayed on as general manager of WCKL and became a 10 percent stockholder and vice-president of CCI. (Tr. 142.) Mr. Pizza is responsible for the day-to-day operation of WCKL (Tr. 123; CFL Ex. 3, p. 5), and, as noted previously, the other principals of CCI are not involved in such operation. (Tr. 148.) Three of the shareholders of CCI reside in California, and one has a dual residence in California and Canada. (Tr. 148.)

[6] The limited partners are responsible for financing the partnership. (CFL Ex. 2, pp. 3-4.)

[7] *See, Omaha TV 15, Inc.*, 65 RR 2d 1019 (1988).

[8] The Presiding Judge is also concerned with the ability of Iselin to devote 20 hours per week to the station on a continuing basis in view of the academic, administrative, and social obligations involved in his full time position as president of Cooper Union. Thus, even if Iselin had shown that the 20 hours per week he proposed would actually be devoted to station affairs, Iselin did not show that he would be able, in light of his full time position in another city, to devote 20 hours per week to station affairs. Clearly, for any week that Iselin did not spend the weekend in Ghent, he would fall far short of fulfilling his integration commitment.

[9] *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1495 (1979).

[10] Iselin's request that the official Cooper Union academic year calendar for 1988-1989 be officially noticed is rejected. This is not the type of matter that may be judicially noticed. Also, it presumably varies from year to year, and its relevancy, therefore, has not been demonstrated.

[11] CCI has been the licensee of WCKL since 1977.

[12] Because the CCI corporate documents provide for stockholder and directors meetings which have not been held, Iselin argues that the Commission cannot rely on CCI. But, it has not been shown that the Commission has ever relied on this licensee's corporate documents as to when meetings would be held or the duties of the president. CCI purchased WCKL; it did not secure the license through a comparative hearing, where representations were made as to the individuals who would run the station on a day-to-day basis. The mere fact that CCI has conducted itself in a very informal manner is not here a matter of decisional significance.

[13] Also, Iselin faults CFL for filing its Certificate of Limited Partnership with the State of California three weeks after the CFL application was filed.

[14] There is no evidence of a transfer of control. Pizza has been in charge of the day-to-day operations of the station as general manager. Control of the corporate licensee, however, has not been transferred to Pizza, and there is no evidence that Pizza has exceeded his authority or acted improperly.

[15] Except Mr. Pizza.

[16] Other than Mr. Pizza, the principals of CCI are residents of California. (Tr. 148.)

[17] The Certificate of Limited Partnership was filed three weeks after the CFL application was filed. Also, Vanoff signed the partnership agreement after the CFL application was filed. But, these factors do not, by themselves, reflect that the application is a sham. *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988).

[18] $100 \times (40/40))^2 \times .28 = 2{,}800$.

[19] $100 \times (20/40))^2 \times 1.0 = 2{,}500$.

[20] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 82-243

In the Matter of

Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz.

SECOND ERRATUM

Released: June 2, 1989

The Commission's *Second Report and Order*, FCC 89-45, released February 28, 1989, is corrected as follows:

1) In paragraph 30, the fourth sentence is changed to read: "In all other respects, our technical standards for new fixed users of the 932-935/941-944 MHz bands will be those currently in use in the 900 MHz private radio bands or those proposed in the *Third Notice* ; *i.e.*, we will use a transmitter frequency tolerance of 2.5 ppm for channels of between 25 kHz and 200 kHz, and emission, power, and antenna limitations as specified in Appendix B."

2) In Appendix C, under PART 21, paragraph 7, the table in Section 21.701(c)(1) is corrected by changing the second entry in the eighth row from 941.8375 to 943.8375.

3. In Appendix C, under PART 22, paragraph 5, the introductory language in Section 22.501(g)(1) is corrected by changing the third sentence to read: "The 928/959 MHz frequencies may be used in paired or unpaired configurations; the 932/941 MHz frequencies are primarily intended for two-way use, but requests to utilize half of a channel pair to satisfy a single channel requirement will be considered upon a showing that spectrum efficiency will not be impaired, and that unpaired spectrum is not available in other bands."

4) In Appendix C, under PART 94, paragraph 4 is corrected to read: "In Section 94.67, the table is amended by adding the following frequency ranges in numeric order to read as follows:" The table is corrected below.

Section 94.67. Frequency Tolerance

* * * * *

Frequency Band (MHz)	Tolerance as percentage of assigned frequency
932-932.5, 941-941.5	0.00015
932.5-935, 941.5-944	0.00025

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1671

Bell Atlantic Telephone Companies' Petition for Waiver of CEI Requirements to Perform Technical Trials of Coin Messaging Service

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1989; Released: June 2, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Public Service Commission of the District of Columbia (DCPSC) seeks reconsideration or clarification of two Bureau orders regarding coin messaging service (CMS). In its first petition, DCPSC challenges our conclusion in the *Coin Messaging Service Order* [1] that the Bell Atlantic Telephone Companies (Bell Atlantic) had adequately addressed the cost apportionment concerns that DCPSC had raised in connection with Bell Atlantic's proposal to conduct a technical trial for that service.[2] In its second petition, DCPSC challenges the *Bell Atlantic Compliance Order* [3] to the extent it failed to address similar concerns that DCPSC had raised in connection with cost allocation manual revisions that Bell Atlantic had filed on June 30, 1988.[4] Bell Atlantic opposes each of the petitions, and DCPSC has replied. In this Order, we address DCPSC's arguments in a consolidated manner and, for the reasons set forth herein, partially grant the petitions.

II. BACKGROUND

A. *CMS Waiver Proceeding*

2. CMS is an enhanced service and, as such, is subject to the comparably efficient interconnection (CEI) requirements adopted in *Computer III*.[5] On April 1, 1988, Bell Atlantic filed a petition for waiver of those requirements in order to conduct a CMS trial without making the basic facilities to be used in the trial available to other enhanced service providers (ESPs) in a functionally equal manner. Bell Atlantic stated that the trial would examine up to three potential CMS technologies and that basic service ratepayers would bear none of the trial's costs.[6]

3. In its comments on Bell Atlantic's petition, DCPSC asserted that neither the petition nor the version of Bell Atlantic's cost allocation manual then on file ensured that all costs incurred in connection with the trial would be apportioned to nonregulated activities. DCPSC requested that we either deny Bell Atlantic's waiver request or hold that request in abeyance pending the submission of detailed cost recovery information by Bell Atlantic.[7] In reply, Bell Atlantic stated that "[t]he customer who chooses to leave a message [would] pay the full regulated price of the coin telephone call and an additional amount to cover the messaging service."[8] Bell Atlantic also stated that the existing coin telephone equipment would "appropriately continue to be assigned to public telephone service and only the additional equipment and expenses incurred for the enhanced services [would] be assigned to CMS."[9]

4. In the *Coin Messaging Service Order*, we found that Bell Atlantic had adequately addressed DCPSC's concerns and, therefore, that those concerns did not require deferral or denial of Bell Atlantic's waiver request.[10] After considering other aspects of Bell Atlantic's proposals, we waived the CEI requirements and authorized Bell Atlantic to conduct a six-month CMS trial subject to certain conditions. The conditions include requirements that Bell Atlantic comply with its cost allocation manual and with the Commission's cost allocation rules in conducting the CMS trial.[11]

B. *Cost Manual Proceeding*

5. Bell Atlantic has filed six sets of cost manual revisions germane to this proceeding. The first set was filed on March 14, 1988, prior to the filing of Bell Atlantic's petition for waiver. Neither the initial manual nor the March 14 revisions listed CMS as a nonregulated activity or proposed to apportion any public telephone costs or revenues to nonregulated activities. These costs and revenues are recorded in Accounts 2351 - Public telephone terminal equipment, 5010 - Public telephone revenue, 6351 - Public telephone terminal equipment expense, and 6623 - Customer services.

6. Bell Atlantic's second set of cost manual revisions, filed June 30, 1988, indicated that Bell Atlantic would be receiving nonregulated revenue from public telephone operations, and proposed to apportion the costs of collecting this revenue between regulated and nonregulated activities.[12] These revisions, however, did not list CMS as a nonregulated activity and did not propose to apportion any public telephone costs to nonregulated activities. In comments on these revisions, DCPSC maintained that Bell Atlantic's proposals were deficient because they did not address all costs associated with CMS and because they did not apportion any public telephone costs to nonregulated activities. DCPSC requested that we require Bell Atlantic to revise its manual to correct these alleged deficiencies. Bell Atlantic filed no response to these comments.[13] On September 30, 1988, Bell Atlantic further revised its cost manual to add CMS as a nonregulated activity, without altering Bell Atlantic's cost apportionment methods in any pertinent respect.[14] DCPSC's comments on these revisions did not address CMS.

7. In the *Bell Atlantic Compliance Order*, we conditionally approved the March 14, June 30, and September 30 revisions. We stated that CMS uses central office switching equipment on a nontariffed basis and that it was unclear whether Bell Atlantic's revisions properly reflected this usage.[15] We required Bell Atlantic to state in its cost manual which of the nonregulated and shared cost pools within its analog and digital switching equipment accounts support CMS.[16]

8. After the release of the *Bell Atlantic Compliance Order*, Bell Atlantic further revised its cost manual on December 30, 1988, on February 28, 1989, and on March 31, 1989. These revisions indicate that Bell Atlantic's analog and digital switching equipment will not support CMS on a nontariffed basis.[17] They make no pertinent change to Bell Atlantic's treatment of public telephone costs and revenues.

III. THE PARTIES' POSITIONS

9. In its petitions, DCPSC reiterates its concerns regarding Bell Atlantic's cost apportionment methods for CMS. DCPSC argues that Bell Atlantic has not adequately addressed those concerns and that Bell Atlantic intends to apportion to regulated activities all of its public telephone costs, other than a portion of the costs it incurs in collecting coins from public telephones. The DCPSC also argues that Bell Atlantic's statements in the CEI waiver proceeding indicate that it is employing incremental costing for CMS. DCPSC maintains that our approval of those statements in the *Coin Messaging Service Order* could be viewed as an endorsement of incremental costing and that any such endorsement would be inconsistent with the Commission's requirement that cost manuals employ fully distributed costing. DCPSC contends that we should disavow incremental costing and require Bell Atlantic to amend its cost manual to employ fully distributed costing for CMS.[18]

10. In its oppositions, Bell Atlantic asserts that DCPSC's petitions merely restate arguments rejected in the *Coin Messaging Service Order*, that it is not employing incremental costing for CMS, and that DCPSC has provided no basis for reconsideration. Bell Atlantic states that public coin telephone service is a basic service employed by end users to access CMS. Bell Atlantic maintains that DCPSC seeks to have the costs of this basic service apportioned to nonregulated activities, in asserted violation of Commission rules and policies. Bell Atlantic contends that the Commission requires that Bell Atlantic's CMS operations obtain public coin telephone service at tariffed rates and that it would be unfair to apportion any costs of that service to nonregulated activities. According to Bell Atlantic, any such apportionment would mean that its CMS customers would have to pay both the full tariffed coin call charge and an enhanced service charge that included basic service costs. Bell Atlantic states that its competitors' customers would not be similarly disadvantaged, because they would pay only the tariffed coin call charge.[19]

11. In reply, DCPSC claims that it is unclear whether the *Coin Messaging Service Order* considered the apportionment of the costs of the coin telephone itself and that reconsideration is warranted to address this matter. DCPSC contends that Bell Atlantic's arguments regarding competitive unfairness appear to be an attempt to justify incremental costing. DCPSC asserts that Bell Atlantic will use its public coin telephones as repositories for CMS revenues and that certain costs of those telephones should be apportioned to nonregulated activities to reflect this function. In DCPSC's view, merely having enhanced services pay tariffed rates for tariffed services does not constitute compliance with the Commission's joint cost rules.[20]

IV. DISCUSSION

12. In the *Joint Cost Order*,[21] the Commission determined that carriers must use a particular system of fully distributed costing to apportion costs between regulated and nonregulated activities.[22] Under this system, tariffed services provided to a nonregulated activity must be charged to the nonregulated activity at the tariffed rates and credited to the appropriate regulated revenue account.[23] This system also requires that Bell Atlantic calculate the costs of the nontariffed services provided to its nonregulated operations by directly assigning costs to regulated and nonregulated activities whenever possible and by allocating other costs between regulated and nonregulated activities using factors reflecting cost causality.[24] The dispute between DCPSC and Bell Atlantic concerns whether Bell Atlantic has properly implemented these principles. Examination of the functions Bell Atlantic proposes to perform in connection with its CMS trial is necessary to resolve this dispute.

13. As an initial matter, we note that contact between Bell Atlantic and a potential CMS customer would begin when the customer attempts to place a call using a public coin telephone. Bell Atlantic correctly classifies this call as basic telephone service and correctly proposes to apportion to regulated activities the costs it incurs in connection with this call.

14. Second, if the called telephone is busy or remains unanswered after a predetermined number of rings, Bell Atlantic would use line monitor equipment to bridge onto the coin line and play a recording that asks whether the caller wishes to leave a message. If the customer were to leave a message, coin messaging host equipment would record that message and periodically dial the called telephone until the message is delivered. Bell Atlantic states that this line monitor and host equipment would be located in the central office.[25] Although Bell Atlantic apparently intends to assign the costs of this equipment directly to nonregulated activities, its cost manual does not so state. Bell Atlantic must clarify this matter in additional revisions to that manual.

15. Third, when the customer leaves a message, Bell Atlantic also would use the public coin telephone as a depository for CMS revenue. This function is part of Bell Atlantic's enhanced service. Thus, it is nonregulated, and a portion of the investment and related costs for the coin telephone costs should be apportioned to nonregulated activities. Bell Atlantic, however, is proposing to apportion all its public coin telephone costs directly to regulated activities. In its additional revisions, Bell Atlantic shall specify procedures for apportioning those costs to nonregulated activities to the extent they are incurred to store CMS revenue.

16. Fourth, Bell Atlantic intends to use its network to perform a variety of transmission functions in connection with CMS. For example, since the equipment that plays Bell Atlantic's recorded announcements about CMS would be located in a central office, the network would transmit such announcements to potential CMS customers. Similarly, any message left by a customer would be sent to host equipment located in the central office and from that equipment to the called party via the network. We agree that the transmission services Bell Atlantic intends to perform in connection with CMS should be classified as basic services. Bell Atlantic should charge its CMS operations for these services on a tariffed basis.[26]

17. Bell Atlantic has failed to make clear whether it intends to charge its CMS operations tariffed rates for each transmission service performed in connection with CMS. Bell Atlantic indicates that the only tariffed charge it may include in its CMS prices will be its normal, tariffed coin call charge.[27] In its additional revisions to its cost manual, Bell Atlantic must describe each of the transmission functions it intends to perform in connection with its CMS trial and show in detail how its procedures with regard to those functions are consistent with Commission requirements.

V. CONCLUSION

18. We continue to believe, as indicated in the *Coin Messaging Service Order*, that Bell Atlantic's CMS trial promises substantial public interest benefits.[28] Nevertheless we share DCPSC's concerns regarding Bell Atlantic's costing methods for CMS. Accordingly, we grant reconsideration of the *Bell Atlantic Compliance Order* and the *Coin Messaging Service Order* to the extent indicated herein, and we require Bell Atlantic to file the additional information described in Section IV of this Order. While Bell Atlantic's authorization to conduct the CMS trial is conditioned on compliance with this filing requirement, Bell Atlantic may begin the trial prior to any action on its filing.[29]

VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communication's Act of 1934, as amended, 47 U.S.C. §§154(i) and 405, that the Petition for Reconsideration or Clarification, filed October 28, 1988, and the Petition for Reconsideration, filed February 8, 1989, by the Public Service Commission of the District of Columbia ARE GRANTED IN PART AND DENIED IN PART, as specified in this Order.

20. IT IS FURTHER ORDERED that the cost manual revisions required herein shall be filed no later than sixty days prior to the start of Bell Atlantic's CMS trial.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Waiver of the CEI Requirements to Perform Technical Trials of Coin Messaging Service, 3 FCC Rcd 5741 (1988)(*Coin Messaging Service Order*).

[2] *Id.* at 5744, para. 29.

[3] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 496 (1989)(*Bell Atlantic Compliance Order*).

[4] Bell Atlantic states that it did not receive or become aware of DCPSC's comments on the June 30 revisions until after the release of the *Bell Atlantic Compliance Order*. Bell Atlantic Opposition to Petition for Reconsideration, Cost Manual Proceeding, at 1, n.2. However, such comments were filed in a timely manner.

[5] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (*Phase I Order*), *modified on recon.*, 2 FCC Rcd 3035 (1987)(*Phase I Reconsideration*), *aff'd on further recon.*, 3 FCC Rcd 1135 (1988)(*Phase I Further Reconsideration*), *second further recon. pending, appeals pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.)(pet. for review filed May 16, 1988); *see also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on recon.*, *,ro>3 FCC Rcd 1150 (1988)(Phase II Reconsideration), further recon. pending, appeals pending sub nom. BellSouth Corp. v. FCC*, No. 87-7290 (9th Cir.)(pet. for review filed April 20, 1988); California v. FCC, No. 88-7183 (9th Cir.)(pet. for review filed May 13, 1988); *and* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.)(pet. for review filed May 16, 1988).

[6] Bell Atlantic Petition for Waiver at 1, 3.

[7] DCPSC Comments on Petition for Waiver at 1-5.

[8] Bell Atlantic Reply to Comments on Petition for Waiver at 4.

[9] *Id.*

[10] *Coin Messaging Service Order*, 3 FCC Rcd at 5744, para. 29.

[11] *Id.*

[12] Bell Atlantic June 30 Revisions at pp. 7.8-18, 7.8-34. These collection costs are recorded in Account 6623.

[13] *See* note 4, *supra*.

[14] Bell Atlantic September 30 Revisions at p. 3.2-3.

[15] *Bell Atlantic Compliance Order*, 4 FCC Rcd at 500, paras. 38-39.

[16] *Id.*, para. 39. These accounts are Accounts 2211 - Analog electronic switching, 2212 - Digital electronic switching, 6211 - Analog electronic expense, and 6212 - Digital electronic expense.

[17] Bell Atlantic February 28 Revisions at §3.0-2.

[18] DCPSC Petition, Cost Manual Proceeding, at 1-2; DCPSC Petition, CMS Waiver Proceeding, at 1-4.

[19] Bell Atlantic Opposition, CMS Waiver Proceeding, at 1-3; *see also* Bell Atlantic Opposition, Cost Manual Proceeding, at 1-2.

[20] DCPSC Reply, CMS Waiver Proceeding, at 2-4; see also DCPSC Reply, Cost Manual Proceeding, at 2.

[21] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987)(*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988)(*Further Reconsideration Order*), *petitions for review pending*, Southwestern Bell Corp. v. FCC, No. 87-1764 (D.C. Cir.)(filed Dec. 14, 1987).

[22] *Joint Cost Order*, 2 FCC Rcd at 1313, paras. 112-13; *id.* at 1317, paras. 150-51.

[23] 47 C.F.R. §64.901(b)(1).

[24] 47 C.F.R. §64.901(b)(2)-(3).

[25] *See* Letter from Thomas J. Moynihan, Jr., Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC (May 16, 1989)(M ay 16 Letter). Bell Atlantic originally planned additional configurations involving the location of other equipment at the public coin telephone. *See Coin Messaging Service Order*, 3 FCC Rcd at 5741, para. 3.

[26] 47 C.F.R. §64.901(b)(1).

[27] Bell Atlantic Opposition, CMS Waiver Proceeding, at 2.

[28] *See Coin Messaging Service Order*, 3 FCC Rcd at 5743, paras. 21-24.

[29] *See* Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109, 123-24, para. 138 (1988)*(Bell Atlantic Order)*.

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